# THE PRACTICE OF THE SPIRITUAL OR Ecclesiastical Courts.

To which is added,

A Brief DISCOURSE OF THE STRUCTURE and MANNER Of forming the LIBEL or DECLARATION.

By *H. C.* (envy) (onsett)

Ραδίως οἱ φαῦλοι κακότητι αἰονῶσι τοὺς σπουδαίους.

*LONDON*,

Printed for *T. Basset*, and are to be sold by *Will. Hensman*, at the *White-Heart* in *Westminster*-Hall. 1685.

*Venerabilibus & Egregiis Viris Domino* Thomæ Exton, *Equiti Aurato, Magiſtro Aulæ Trinitatis* Cantabrigiæ, Johanni Boord, J. C^to. L. L. *Profeſſori in eadem Aulâ. Sociis inſuper inclytis, Adoleſcentibuſque ejuſdem Aulæ ſalutem, gratiam benedictionemque omnimodam utplurimum exopto.*

QUid de meâ (Domini tam inſignes) tantâ loqui audaciâ molirer: Qui veſtra nimirum nomina, ubique tam celeberrima, paginis hiſce, perperam omnino ſcriptis prætexere auſus fui? Voſmet revera, inſtar Aſyli (cui eſt mihi fugiendum) ante me poſuiſſe planè confiteor. Candori profectò, benignitatique vôſtrum, Anchoram certò figens; obſequii, erga Adoleſcentes à me obnixè optati, ſcintillam largiri aggreſſus ſum: Ut Curiarum nempè Eccleſiſticarum πρᾶξις, ex meis licet conaminibus, admodum languidis, in methodum tam accuratam redigeretur, dummodo tam in Praxi, quàm in Jure, (prout res natâ fuerit) confeſtim eruditi, imbutique eſſe queant. Hocce opuſculum, non eſſe non exiſtens Domino *Clarke*, apprimè deberi fatetur: Methodicè aſtverò exiſtente, aliis haud parùm authoribus ſemet (ut opinor) aſtrictos, Adoleſcentes haud denegabunt: Aliquorum nomina, Libri ſequentis marginimemet adjunxiſſe pateat. De Libro namque iſthoc Domini *Clarke*, inſcripto [*Franciſci Clarke* Praxis Curiarum Eccleſiaſticarum] hocce (ſemotâ invidiâ, detractioneque omnimodâ abjurata) ſum dicere coactus, methodum ejus perperam omninò, crudamque exiſtere; Adoleſcentesve in praxi, abſque bene eruditorum adminiculo interveniente pariter & inculcante, nullatenus inſtruere capacem.

Operi aſtverò huic ſuſcepto, ab aliâ etiam cauſâ

memet aſtringi agnoſco: Societati nimirum veſtræ tam inſigni ut litarer; veſtraſque inſuper verbis, exaggerarem laudes. Alumnum ſicuti à vobis, memet vocare non eſt permiſſum; ab radiis tamen à vobis profluentibus, totumque terrarum Orbem illuminantibus (mediante nempè conſilio *Clar.* Domini *Barloæ Wickham* è veſtrâ ex nupero Societate, cujus honorificè ſum recordatus) ſcientiam iſthanc licet minimam, in jure civili mihi acquiſitam (intendente memet, prorſuſque huic deſtinato ſtudio) accepiſſe lubenter agnoſco. Heu, heu fortuna tam vaga maximéque ardua! Væ hominum malitiæ, fidelium progeniem, atque Læſæ majeſtatis Jura vindicantium, hiſce conatibus, ſummèque fractorum, ſpernentium! Væ invidiæ, ſævitiæque novercæ, ita immenſè iniquæ! De eſſe meo fermè ſpoliavêre: In me miſerias, protruſêre, ut conamina, conſiliaque mea aboriuntur. De hiſce loqui ecquid ultra ſtatuero? Ultra patrocinium, à vobis mihi donari imploratum, nihil certè omnino: Ut opus inſuper hoccine à me ſuſceptum pergratum vobis videatur: Effectum (ſicuti in votis ſemper habeo poſitum meis) ſuum ſortiatur debitum, nuſquam vovere omittendum eſt mihi,

Vobis (Præclari) Humiliter Addictiſſimo,

*Henrico Conſetio.*

*Eboraci Dat. Calend. Martii Anno Salutis,*
M.DC.LXXXI.

THE

# THE EPISTLE TO THE READER.

*IT is not unknown to any who pretend to the leaſt of either Learning or Hiſtory; that the Civil Law (though ſo contemptible in this our Nation) is a Study of as great Learning and Reaſon, as any Law in the World: No Nation where it is profeſt, ever yet complaining of its Deficiency in any thing, might render it compleat and perfect, ſo as to adminiſter Juſtice to every one in their Station.*

*Nor have the Profeſſors thereof been in leſs eſteem, or leſs eminent, than the Profeſſors of our Common Law are here in* England *at this day; being alway notified and diſtinguiſhed from other Profeſſions, by the graveſt and moſt reſpectful Titles;* [*as* Juris-Prudentes, Juris-Conſulti, *&c.*] *Nor have they ever wanted the Benevolent Aſpect of thoſe Emperours and Princes, under whom they exerciſed this Function, employing them in their Embaſſies and Councils; by reaſon whereof, they have received great Bounties, and have had Honours conferred upon them, for their Service in that Capacity. One inſtance we have of the Emperour* Charles *the Fourth; who conferred upon* Bartholus (*a Learned Civilian, and one of his Council*) *a Coat Armour, as a reward of his Ingenious Councils and Memorable Service.*

*And truly I ſee no cauſe, why we ſhould have leſs, but rather greater eſteem for all ſuch wholeſome Laws, as curb and limit the Exorbitances of Licentious Men;*

*at*

*at such a time, when the just vengeance is ready to overtake us. For what* Idiot *discerns not the manifold and deformed Confusion of Opinions, Worships and Manners, have corrupted things both publick and private? Daily, and almost Tragical Examples, obvious to all, do demonstrate to us, how Licentious Men are grown; how they make themselves drunk with Wickedness; how they endeavour to eclipse the lustre of our Common-weal, how they strive to bring a Plague upon our Church, and Danger to all.*

Flectere si nequeunt Superos, Acheronta movebunt.

*That our Ecclesiastical Laws professed in this Land, have lain, and at this instant, do lye under most unjust and severe Imputations, I am very sensible. And being desirous to convince the vulgar, that they are unjust; I have reduced the following Discourse into English, and that in so full and plain a Method, as the weakest capacity may be satisfied, and inform it self as to the justness of Proceedings: And so may be induced to lay aside their common and usual Exclamations against the Church and Government; and rather hate the Manners of such time serving Wretches, as stick at no Extortion or Oppression, may raise their own Fortunes and Estates; not respecting what Injury accrews to the Church or its Government at the same time. But it has been the misfortune of several Nations and Societies, to entertain some one or more, whose indirect Practice, was sufficient to bring a Scandal upon the best and purest of Professions and Governments. Which makes* Tully *renew to the Consideration of the Senators in his Oration against* Catiline, *the Ancient Provision was made by their Laws, to punish a Pernicious Citizen with more severe Punishments, than an Inveterate Enemy. Yet however, I hope an amends*

*amends is made by others, imployed in theſe Concerns, whoſe Honeſty and Ingenuity ſets them above all baſe and ſneaking Acts; ſo as not to ſeek Preferments by Injuring other Men; nor to get Eſtates by Oppreſſing the Country, and Scandalizing a Government unblamable: Neither will they need to cover or leſſen their own Crimes, by making every little Miſcarriage or Precipitous Act committed by other Men, appear black and odious. Such Men I queſtion not there are, but I fear they are very ſcarce.*

*The enſuing Diſcourſe is not ſet forth, either out of Prejudice or Oſtentation; but that the Practice of the Spiritual Courts, may be underſtood by all People, to be regular and juſt: Nor is it, I hope, leſs uſeful to the* Juris Tyrones, *by being in Engliſh, and having not only the* τὸ ὅτι, *but the* τὸ διότι, *not only an account that a thing is, but what and why it is: I hope it will rather be more uſeful; the true* τίμον, *of every word, as it falls in to be diſcourſed of, or underſtood in the Practice, being alſo given: Which* Cicero *in his Book,* de Officiis, *accounts a thing of no ſmall moment, as he intimates in theſe words:* Scil. Quæ à ratione ſuſcipitur de aliquâ re inſtitutio, debet à definitione proficiſci, ut intelligatur quid ſit id de quo diſputetur.

*Some probably will quarrel that I uſe Mr.* Clarke's *words,* Quid dictum quod non prius? *I affirm 'tis no Argument of Arrogance in me, nor any Derogation from his worth: Seeing none but his words, or the words of ſome of his Contemporaries, could have had ſuch authority; he having been an Ancient Practitioner, and affirming many Points of Practice to have been obſerved in* Praxi Perenni, *for many years together: And ſo conſequently allowed of as good Precedents to Succeeding Ages. Which thing being conſidered, may, I hope, take off the Edge of Detraction. However, to ſuch as are diſſatisfied*

*ſatisfied with the Work, I ſhall uſe the words of a Comic-Poet, in anſwer to their Querele.*

——— Non omnibus unum eſt,
Quod placet; hic Spinas colligit, ille Roſas.

*Yet far be it from me, to be offended at the Envious Calumnies of Men: Seeing many Worthies in all Ages, have fall'n under the like miſhap. I ſhall only ſoberly and ſincerely affirm, my chief aim was the Glory of God and his Church, and the good of my Countrymen. So that my only hope is, every Detractor, will in time be aſhamed of his cauſeleſs Detraction, when he ſees ſo much Reproach ſpread abroad in vain.*

Invide quid laceras? An effrænata voluptas?
Quid latras? Mordes? Quid tot præſtigia canes?
Depone invidiam: Non eſt tua tuta voluntas.
Tu Dominum ultorem, juſtorum certo videbis.

*Yet at the ſame time, I acknowledge the Undertaking is weighty, and the Attempt bold in me: Conſidering the ſmall Experience I have had in theſe Concerns; The many Misfortunes and Diſcouragements have continually prevented thoſe Opportunities others have imployed, in Improving their Knowledge and Faculties: And alſo conſidering the Work is to undergo the Cenſure of ſo many Ingenious Criticks, to whom I ſhall be Obliged for their Candid and Friendly Cenſure or Reprehenſion; hoping they will with Candor amend what's amiſs, and be Prompted to ſome New Adventure, on this Account, may render them more Serviceable to their Country Men. At leaſt I do not doubt but this will find a Friendly and Candid Acceptance among ſuch as are Unprejudiced, and whoſe affable and meek tempers will rather prompt them to amend an Errour Committed, than Calumniate.*

THE

# THE PRACTICE OF THE Eccleſiaſtical Courts.

## *THE FIRST PART.*

### CHAP. I.

### SECT. 1.

**What a Court is, and of the Eccleſiaſtical Courts which are celebrated, or kept by the moſt Reverend the Arch-biſhop of *Canterbury*.**

1. *The definition of a Court, and what Courts are here treated of.*

A Court was formerly called by the *Romans*, a part of the People; from the diviſion of *Romulus* who firſt diſtributed the *Roman* People into thirty parts, that ſo he might more readily ask the Sentiments or Opinions of every * one, and thereby take care of the Republick. Whence it appears, that the care which they took in their Political Government, they gave it the ſingle denomination of a Court. Afterwards the Place † in which they managed theſe public cares or con-

* *ff. de orig. Jur. l. 2. Sect. 2.*

† *Petrus Ponc. de Jur. municip. n. 21. p. 68.*

cerns, or the Seat and Temple of the publick Council, obtained the name of Court: which denomination it has at this day. A Court being defined the place where Justice is Judicialy administred. And in the Civil Law it is sometimes call'd by the names of *Curia forum*, as also *Judicium* though improperly, being no constitutive part or immediate Cause of that which is properly called *Judicium*, but rather the remote Cause: *Judicium* being defined by *Aristotle* κρίσις τῦ δικαίυ κ) ἀδίκυ a Judging between the Just and Unjust, and is conitituted by three persons, The Plaintiff, (called in the Civil Law *Actor*) the Defendant (who is also called *Reus*) and the Judge, which three may be said to be the immediate Cause of it.*

* *Actor ab agendo from acting. Reus a Re, from the thing. Wesemb. par. ff. de judiciis n. 9. 10, 11, 12. Chilianus in pract. c. 22.*

To give an account of the several divisions of Courts in the time of the *Romans*, or those at this day, were far from the purpose. The Courts here spoken of are, the Spiritual, or Ecclesiastical Courts; and those especially which are celebrated and kept in the name, and by the authority of the Arch-bishops of *Canterbury*: Which are,

*First*, *Alma Curia Cantuariensis de Arcubus London*; (which probably receives its name from the Effects, or by a Metaphor, being the Channel whence Justice flows like a Christalline stream) is kept within the Parish Church of St. *Mary* the Virgin, *de Arcubus Civitatis London*, and was anciently called by the name of the Arch-bishops Consistory as appears by the old Statutes of that Court.

*Secondly*, the Court of Audience. *S. Curia Audientiæ Cantuariensis*, which is kept in the Consistory place, within the Cathedral Church of St. *Pauls London*.

*Thirdly*, *Curia Prærogativæ Cantuariensis*, which is likewise kept in the same Consistory place.

## SECT. 2.

### Of the Days observed in those Courts for Judgment, called in the Law *Dies Juridici*.

THe Days called in the Law *Dies Juridici*, are such as are only proper and suitable, and set apart (in the Law) for Judicial Acts: In which respect, they are termed oppo-

oppoſites to Holydays; † theſe being exempt from all Judicial Acts, and rendering them null and void if attempted to be Executed on ſuch days.

† *Weſemb. ff. T d. feriis l. 1. & l. omnes in fin. Jaſon. in. l. 4. n. 3. hoc tit. Spec. d. fer. Sect. fin.*

Theſe *Dies Juridici* are reduced to four Terms in the year; each Term containing ſometimes twelve, fifteen * or twenty days, ſometimes fewer.

* *It is ſo in the Courts of the Arch-biſhop of York.*

The firſt general Seſſions held in the Court of the Arches (for *Michaelmas* Term) was kept for many years together, the next day (if no Holyday) after the Feaſt of St. *Faith* the *Virgin.* *Court of Arches*

*Hillary* Term begun, likewiſe the next day (if no Holyday) after the Feaſt of *Hillary*, the Biſhop.

*Eaſter* Term was alſo kept on Monday fortnight after *Eaſter-day*, the ſaid Court commonly being *proximo Quindenæ Paſchæ.* For example, in the year 1680. *Quinden. Paſch.* is the firſt day of May (that being juſt a fortnight after *Eaſter*) and this Term begins the ſecond of *May* in this Spiritual Court.

*Trinity* Term was kept in like manner the very next day (if no Holyday) after the Feaſt of the bleſſed Trinity.

The Court of *Audience* is always wont to be held in the fore-noon of the day next after the Court of the *Arches* (if no Holyday): And in the after-noon of the ſame day, *Court of Audience.*

The *Prærogative* Court is likewiſe wont to be kept. *Prærog. Court.*

After theſe days there are no certain or determinate days in which the Law is publicly pleaded. Though frequently after the ſpace of ſix, ſeven, eight or more days after any Court day (as the matter requires) they are wont to have Informations (as they call them) for the more eaſie and ſpeedy expedition, and terminating of Suits depending in theſe Courts.

It is alſo uſual for Citations to be Iſſued forth againſt the Defendant to appear the third, fourth, ſixth or other day next following the Citation, wherein the Judge happens to ſit Judicially to Try Cauſes (no day of the Month being named) and this is called *dies incertus*, only in reſpect of the time when he muſt appear; the other neceſſaries and conſtitutive parts of the Citation (*Scil.*) *de quo & an & cui exſtiturus ſit*, being compleat. In which caſe it is neceſſary that the Defendant repair immediately to the place

where the Court is to be kept, and inform himself certainly what day of the Week or Month is the day intended for his appearance; least his Adversary get advantage by his not appearing.

## CHAP. II.

*Of the Original of the Court of Arches, the Court of Audience, with their Styles, and the Causes generally Tryed in them, also the Jurisdiction of those two Courts Jointly.*

### SECT. 1.

### Of the Court of *Arches.*

1. *Its Original, and why its Official is called Dean of the Arches.*
2. *Its Style; how defined in general.*
3. *The Causes usually tryed in it.*

1. THe Original of the Court of Arches is uncertain, but it is evident that such a Court as is here spoke of has been of old: For *Alexander* the Third being Bishop of *Rome* in the Reign of *Henry* the Second, did (by his Writing, or Edict to the Dean of the Arches, and *Robert Kilworbe* Arch-bishop of *Canterbury*, who held the Seat *Anno* 1272.) abrogate and abolish all the antient and obsolete Laws of that Court and set up others in their stead.

The Official of this Court is at this day (as he has been wont so to be) called Dean of the Arches, being for the most part imployed in this Kingdom (as well as in parts beyond the Seas) in the Kings affairs, and therefore seldome resident within the City of *London.*

But He being absent, the Dean of the Deanary of the Arches, (whose Jurisdiction is terminated by the Limits, or Bounds, of thirteen parishes in *London*, which are belonging

ing to the Eccleſiaſtical Juriſdiction of the Arch-biſhops of *Canterbury*) is often ſubſtituted, as the Surrogate of that Official; (and that by preſcript of the ancient Statutes of the ſaid Court) in which ſtate he hears and determines Cauſes as Official. Whence by vulgar error he (as alſo the Official himſelf whilſt at leiſure to diſpatch buſineſs) is called the Dean of the Arches. The ſaid Official is likewiſe called Official of the Conſiſtory of the Arch-biſhop; or elſe barely Official without other addition, as appears by the ſaid Statutes: Sometimes the Arch-biſhop of *Canterbury* has had no other Official at the ſame time beſides him.

2. The next thing conſiderable is the Style of the Court. This word Style is confuſedly taken in the Law; ſome times for the word *conſuetudo*; (which takes likewiſe the name of *Stylus Curiæ*, *Stylus Judicii*, *&c.*) How theſe words *Stylus*, *Conſuetudo*, *& Obſervatio* do differ, is to tedious now to ſhew; though formerly they were indifferently uſed one for another. It is defined at this day a particular Cuſtom, only powerfull, and of force in that Court, where 'tis in uſe: In which reſpect it differs from a Cuſtom which may poſſibly be ſo general, as to be of force in the ſeveral diviſions of Courts. The Style of this Court is uſually entred in words to this effect. (*Scil.*)

*Daniell Dun* Knight, Doctor of Laws, principal Official * of the beautiful Court of *Canterbury* in the Arches *London*.

3. As to the Cauſes tryable in this Court; its Official is the proper and competent Judge to take cognizance of all Eccleſiaſtical Cauſes whatſoever † not only at the Inſtance of Parties, but alſo of his meer Office, or when 'tis promoted, as alſo all manner of Appeals whatſoever from any Biſhops, Deans and Chapters of Cathedral or Collegiate Churches; Arch-deacons, their Officials and Commiſſaries, or other Eccleſiaſtical Judges whatſoever (except ſome certain peculiar Juriſdictions within the Province of *Canterbury*, which belong to the King's Majeſty) having, or exerciſeing any Eccleſiaſtical Juriſdiction or Authority. Alſo all Commiſſaries of the Arch-biſhop of *Canterbury*, whatſoever particular or ſpecial within all or any Dioceſe of his

* *Officialis quid ſit ejus officium* Lind. *de Sequeſtr. c. frequens verb. Officiales.*

† Lind. *de Judicijs. c. 1. verb. Committatur. Decan. de Arcubus ex ſola conſuetud. abſque Commiſſione Archiepiſcopi, non poteſt cognoſcere in Cauſis matrimonialibus. & an Commiſſio debet eſſe generalis vel ſpecialis.*

his Province; to wit, from the Commiſſaries of the Archbiſhop which are conſtituted within the City and Dioceſe of *Canterbury*. Alſo of all Complaints whatſoever againſt any of the aforeſaid Judges (except as before excepted) for denying or delaying of Juſtice to be adminiſtred. The Official of the Court of Arches may alſo proceed in all Cauſes whatſoever relating to Benefices, either by way of Conteſt betwixt parties, or by way of ſingle or double complaint, and may inſtitute or ſuſpend.

## SECT. 2.

## Of the Court of Audience.

1. *Its Original.*
2. *Its Style.*
3. *The Cauſes uſually tryed in it.*

THE Original of the Court of Audience ſeems to be from this (*Scil.*) the Arch-biſhops themſelves were wont to try and determine very many Cauſes at their own Pallaces; but before they pronounced their definitive Sentence they commited the matter to be diſcuſſed and argued by ſeveral men, skilled and learned in the Law, whom they named their Auditors: So that for the executing this power (formerly domeſtick) there were Auditors of the Arch-biſhops Court, (and of the Cauſes therein) appointed every where. To the Auditors there was likewiſe joined a Chancellor of the Arch-biſhop, who executed Cauſes of their mere Office only and no other.

2. The Style of this Court is in the name and ſtyle of the moſt Reverend the Arch-biſhop, and all perſons ſummoned to appear, are ſummoned in his name, to appear before his Auditor of Cauſes for his Court of Audience.

* *Vicarius Generalis & Officialis quomodo differunt* Lind. *de ſequeſt. poſſ. c. frequens verb. Vicarios & verb. Official. eorum Officia ibi reperias.*

3. The Auditor of the Court of Audience of *Canterbury*, hath in all things, the ſame Juriſdiction with the ſaid Official of the Arches; and has anciently been (as at preſent he is) by vertue of a ſpecial Commiſſion, Vicar * General of the ſaid Archbiſhop of *Canterbury* in things Spiritual,

tual; in which capacity he executes all and ſingular Spiritual and Eccleſiaſtical Juriſdiction of every Dioceſe becoming vacant within the Province of *Canterbury*, which might other ways appertain to the Biſhop thereof, if in being: And the ſaid Juriſdiction (the Epiſcopal Seat ſo becoming vacant) he is wont to exerciſe by himſelf, and his Commiſſioners; and alſo to inſtitute, to ſuch Benefices as are vacant in any Dioceſe within the Province of *Canterbury* (the Biſhop thereof being ſo awanting) as well as in the Dioceſe of *Canterbury*. Likewiſe he may by Law and Cuſtome celebrate the Ordinary viſitation within the City and Dioceſe (where the Epiſcopal Seat is vacant within the Province aforeſaid) and puniſh ſuch offences as are there preſented. This Likewiſe happens equally to both the Judge of the Court of Audience, and the Official of the Arches, that as well the one as the other, may ſummon any Inhabitant within the ſaid Dioceſe (ſo vacant as aforeſaid) to appear before him in the Place of Judgement above-named, notwithſtanding the Stat. 23. *H.* 8. c. 9. Seing, that by the vacancy of the Epiſcopal Seat of any Dioceſe, within the Province of *Canterbury* the Archbiſhop is made the Ordinary of the place and of the Dioceſe, during that vacancy; ſo that he may tolerate his afore-ſaid Judges, that they may freely cite all Inhabitants within that Dioceſe where the Seat is vacant, and compel them to appear in the ſaid Courts at *London* notwithſtanding the aforeſaid Statute.

## SECT. 3.

### Of the Juriſdiction of the Judges of the two aforeſaid Courts jointly. And what Juriſdiction is.

BEcauſe as is aforeſaid one and the ſame Cauſe, may be tryed in the Courts of Arches, and Audience; it is left to the election of the Plaintiff to elect in which Court he will inſtitute or promote his Cauſe, whether in the Court of the Arches, or Audience; yet ſo, as no man be cited originally to appear out of the Dioceſe or peculiar Juriſdiction in which he lives, except in the caſes under-

written. *Scil.* 1. Except a Suit be commenced for any exceſs committed, or any office neglected or omitted, againſt Juſtice and Equity, by any Biſhop, Arch-Deacon, Official, or other Perſon or Judge having any Juriſdiction Eccleſiaſtical; or 2. Except it be proceeded by way of appeal. Or 3. Except either of the parties in controverſie, do think he has any juſt cauſe of *Gravamen*, or damage offered him by the Ordinary of the place, his Subſtitutes, or Miniſters, after the Suit is commenced before the ſaid Ordinary; Or 4. Except the Biſhop, or Judge dares not, or will not proceed againſt the party convened before him; Or 5. Except the Biſhop or Ordinary of the place, where the Cauſe ought to be Inſtituted, pretend himſelf intereſſed in the buſineſs directly or indirectly; Or 6. Except the Biſhop, or other inferiour Judge having Eccleſiaſtical Juriſdiction, in his own Right, or by Commiſſion from ſome elſe; do by his Letters of requiſition or remiſſion, deſire, or requeſt the ſaid Arch-biſhop, his Official or Auditor afore named, to take to him the ſaid cauſe, and duely to examine, and determine the ſame; Or 7. Except a Suit be commenced in a Cauſe, for ſubſtraction of a Legacy, where the Will (by which the Legacy is given) is proved within the Prerogative Court of *Canterbury*, ſeing in this caſe, the Executor, by proving the Will there, has acknowledged the Arch-biſhop his Ordinary, and hath conſented to his Juriſdiction; Or 8. Except the Suit be tryable, as in the Caſes mentioned in the enſuing Chapter. In any of theſe Caſes the Defendant may be ſummoned to appear (Originally) out of the Dioceſe where he lives, notwithſtanding the Maxime *Actor ſequitur forum Rei*, that is, the Plaintiff muſt inſtitute his Cauſe, in the Court, to whoſe Juriſdiction the Defendant belongs; for the words *Forum competens*, a competent Court, and *Juriſdictio fundata* are convertible terms.

* *Halm. ad Weſemb. ff. de Juriſdiction. n. 2. Manual. juris a Sebaſt. Almerſ. in prax. fob. 6. Weſemb. ubi ſupra de Juriſdictione n. 3. & per tot.*

The word *Juriſdictio*, * from the uſe of the *Roman Laws*, is variouſly taken and underſtood; That here ſpoke of, ſeems to bee only *Juriſdictio ordinaria*, which is a lawful power (given to him who is appointed Magiſtrate) to determine civil and private Cauſes: ſignifying likewiſe

*forum*

*forum competens* † or the proper Court where any ought of right to appear; in which ſenſe alſo we are to underſtand *Judex ordinarius* to ſignifie a competent or proper Judge, before whom any ought to be convened.

† *Ordo Camer. p.2. t.1. Sect.1. Jacob. Blum. proc. Cam.t.27. n.17.*

## CHAP. III.

### SECT. 1.

### Of the Prerogative Court of *Canterbury*.

1. *Its Style.*
2. *The Cauſes tryed therein.*
3. *The manner of declineing the Judge of this Court, and the manner of alledging his Juriſdiction.**

THE Style of this Court, is likewiſe wont to be, in the Name and Style, of the moſt Reverend, the Arch-biſhops of *Canterbury*; and all perſons ſummoned to appear are likewiſe ſummoned in his name to appear before Him, or the Keeper, Maſter, or Commiſſary, of his Prerogative Court of *Canterbury*.

*This is ſhown afterward in the 6. part of the book chap. 3. num. 15, 16.

2. To the Judge of the Prerogative Court do belong all Probations, and Approbations of Teſtaments, the Power of granting Adminiſtrations of the Goods of perſons dying (inteſtate) within the Province of *Canterbury*; to wit, who have Goods, Rights or Credits moveable or immoveable, † out of the Dioceſe, wherein they lived, or inhabited at the time of their death, of which they were capacitated to diſpoſe, or have diſpoſed: If the ſaid Goods ſo out of the Dioceſe extend but to the value * of 5l. or upwards, which ſaid Goods are called *bona notabilia*, by the Style and Cuſtom of that Court, which is in force at this day.

† *De bonis & terris teſt. and. vide Swinb. p. 3. Sect. 2, 3, 4.*

* *Lind. cap. Statutum d. teſtam. verb. Laicis. Swinb. p. 6. Sect. 11 n. 5.*

In this Court are Tryed all Cauſes of Inſtance, for the proving and revoking of Wills, whether originally (in that inſtance) exhibited, or formerly proved in Common form of Law; and for the granting and revoking of Adminiſtrati-

niſtrations in the aforeſaid Caſes, whether the Judge was privy to the circumſtances, at the time of granting the Adminiſtration, or whether it were ſurreptitiouſly obtained, the truth being ſuppreſt, and falſity ſuggeſted by the party deſiring the Adminiſtration, contrary to the Law and the Statute, or if it afterwards appear there was a Will proved or Adminiſtration granted by any other Judge (whereas the ſame ought to have been done by the Judge of the Prerogative Court) and that it is evident touching their timerary Adminiſtring; in theſe or the like Caſes, Cauſes of inſtance may be promoted in the ſaid Court: Alſo all Cauſes about giving accompts, for Example: If any Will be proved in Common Form (which is done by the ſole Oath of the Executor) if any perſon have an intereſt in the Adminiſtration of the Deceaſed's Goods (being perhaps prevented of his intereſt by this pretended Will) hee may force the Executor to prove the Will by witneſſes, which if the Executor do not ſufficiently prove, Sentence is to be given, that the Deceaſed dyed Inteſtate, and that the Probate of that Will ſo granted in common form of Law, is to be annull'd and revok'd. If an Executor, who is a ſtranger to the Deceaſed, (that is) no way related to him, have the greateſt part of the Deceaſed's Goods bequeathed to him, and is doubtfull (the witneſſes to the Will being dead) leaſt the Children, or next of Kin, or the Widdow of the Deceaſed, ſhould commence Suit againſt him for the future, he may by vertue of that Will call the Relict, the Children and next of Kin of the Deceaſed in ſpecial (if they think themſelves any way * Intereſſed,) and all others whatſoever in general, that pretend to have any Intereſt in the laſt Will and Teſtament of the Deceaſed, or in the Adminiſtration of his Goods, to come and ſee the Will proved by Witneſſes; and lawfull Proof being made of this Will, and a definitive Sentence paſt for the validity of it, this Will can never be made invalid or voidable hereafter (ſo as there be no nullity in the proceedings) though the Teſtamentary Witneſſes dye in the mean time. And this is frequently practiſed. But after a Will has been proved in Common Form of Law without

* *Nam ſic citand. non videtis approbare perſonas ſuas.* Cævola *caut.* 205. Enchir. Cautel. *de cit. perſonali. c.* 1. *p.* 1.

out being queſtioned or diſproved for the ſpace of thirty † years, then all benefit of Diſproving it, is taken away and loſt.

† Swinb. *part.* 6. *Sect.* 14. *n.* 4. *Attamen poſt teſtam. & in forma communi probatum.* &c. *Vide manuſ. Latch. p.* 129 Mynſ. Inſt. *tit. teſtator habens lib. in poteſt. in text. n.* 7

But it is to be obſerved, that when an Executor is called to prove a Will by Witneſſes, and does ſufficiently prove it, if the Plaintiff, who deſired to have the Will ſo proved, makes no exceptions or replyes (after the publication of the Witneſſes ſo examined upon the Will) againſt either the Will or the Witneſſes, nor does propound any dilatory matter, to hinder the giving of Sentence for the validity of the Will, then the Judge cannot condemn the party (overcome) in expences: But it is otherways if he does propound dilatory matters, and fails in the proof of them, for then he is condemned in expenſes of Suit, at leaſt in thoſe that are made ſince he propounded his contrary Pleas.

Alſo all Cauſes in this Court are ſaid to be Summary Cauſes, becauſe they require a Summary proceeding.

Laſtly, it is to be noted, that if any Will be Exhibited at the Petition of any party deſiring to have it revokt, it is very neceſſary the Proctor of that party (inſtituting the Cauſe) do immediately accept the contents of that Will, ſo far as they make for his Client, leaſt if any Legacy being given his Client by the Will, he likewiſe looſe that by his general Negation, and Diſproveing the Will. This is a work of Supererrogation, being ſpoke of (and more properly no doubt) in the particular Practice which theſe Cauſes require.

## SECT. 2.

## The manner of Proving Wills in this Court in Common form of Law. &c.

1. *What a Will is.*
2. *What are the Conſtitutive or Eſſential parts of it.*
3. *What are the Accidental or Formal parts of it; and how it differs at this day in* England *from thoſe Forms obſerved by* Juſtinian.
4. *The differences of Wills, many ſorts of which are abrogated.*

5. *The*

5. *The Will how proved in Common Form, and the Executor how ſworn.*
6. *No Executor named in the Will to whom is the Execution of the Will committed.*
7. *The Executor being dead who muſt prove this Will.*

TO this Court likewiſe belong (as is ſaid) the Proveing of Wills, *&c.*

* Mynſ. Inſt. *de teſtament. ordinandis in text. teſtament. n.* 5, 6, 7, 8, 9. *hæc per tot hæc omnia reperias.*

1. A Will or Teſtament is defined the abſolute * Sentence, Determination, or Decree of our Will, touching that which we intend ſhall be done after our death.

2. The conſtitutive parts of this Will are, the Teſtator, who has power, to make a Will lawfully (intimated by theſe words, *our Will*:) And the Executor called in the Civill Law (*hæres*) which is implyed in theſe words [abſolute or Juſt Sentence] for it cannot be ſaid to be perfect unleſs an Executor be appointed.

3. The Accidental or Formal parts of a Will are the Witneſſes; or thoſe Circumſtances which are uſed as Atteſtations to prove the Will Juſt, Lawfull and Right. The ſolennity of which, differs much at this day, (here in *England*) from that formerly practiſed; and mentioned by *Juſtinian* and other Civilians. as may appear by *Stat.* 30. *Car.* 2, C. which will ſhew the Solennity ſo much at large, as it needs not be here inſerted.

4. The differences of Wills are many, as they are enumerated by *Juſtinian* in his Inſtitutes, the Digeſts, and the Gloſſes thereupon; but what ſorts and forms of wills are only in force now in *England*, may appear by the aboveſaid Statute.

5. At the time the Executor Proves the Will, he brings to the Judge one or more Witneſſes, who ſwear to make a true anſwer to ſuch queſtions, as the Judge demands of them touching the laſt Will and Teſtament of the Deceaſed. Then the Executor ſwears in this manner. *You ſhall ſwear that you believe this to be the laſt Will and Teſtament of the Deceaſed, and that you will pay all the Debts and Legacies of the Deceaſed, ſo far as the Goods will extend, and Law ſhall bind you; and that you will cauſe all the ſaid Goods to be apprized, and make a true and perfect Inventory of the ſaid Goods*

(*at*

*(at a day appointed by the Judge, if none be then exhibited) and likewiſe a true and juſt accompt of the ſaid Goods, when you ſhall be thereto lawfully called. So help you God.* They muſt likewiſe enter Bond to the Ordinary to this effect. Upon this, the Judge, either tacitely, or expreſly in words, pronounces the Will valid, and grants the Execution of the ſame to the Executor.

6. If there is no Executor named in the Will, then the Execution of the Will, is committed to the Univerſal Lagatee named in the Will (if there be one) ſimply as if he were Executor. If there is no ſuch named, then the Adminiſtration with the Will annexed is granted to the next of Kindred to the Deceaſed, in like form as Adminiſtrations are granted, if there be no Widdow, or that it do not plainly appear to the Judge, who the Deceaſed intended for his Executor.

The Executor dying before he can prove the Will, then the next of Kin to the Executor proves the Will (if the reſidue of the Goods were diſpoſed of to the Executor, by that Will) with Adminiſtration thereto annexed: as ſuppoſe a Wife, (being Executrix, and univerſal Legatee, named in her Husbands Will) dye before her proving the Will, (leaving no Children, of her Husband the Teſtator) in this caſe, the Ordinary grants the Adminiſtration, with the Will annext to the neareſt of Kindred to the Wife in manner as follows.

## SECT. 3.

## Of Adminiſtrations.

1. *How theſe words* Adminiſtrare *and* Adminiſtrator *are underſtood.*
2. *What are the ſorts of Adminiſtrations here meant of.*
3. *By What courſe obtained, and the Oath they take.*

1. A*Dminiſtrare, & negotia* gerere*, ſeem to be recipro- calls; in as much, as they predicate *de Procura-tore*, or the Manager of affairs: and an Adminiſtrator in a large ſenſe, is no other than a Procurator (that is he) Who

**Manual. Juris a Seb. Almers. verb. Adminiſtratio.*

who derives a power to manage, or carry on affairs: their Office, or Act is called *Administratio*: but these words more strictly taken (as they are here meant) do signifie the management of the affairs, of any one Deceased, by a special power derived from the Ordinary of the place, *&c.* So that, *negotia gerere*, and *negotia agere*, are opposites, seing this last predicates only of Judicial Acts.

2. This Power so derived from the Ordinary, are the Letters of Administration, which are either simply such, no Will at all being made, or comparatively such, where a Will being made, but the Executor either not named or else is dead, as above; in which case the Will is proved as before, and Letters of Administration annexed to the Will with the ordinary Probate (which is the Judges approbation of the said Will, pronouncing for the validity thereof) and this is called an Administration, with the Will annext.

3. If there is no Widdow, or Relict of the Deceased (to whom the Administration of the Goods of the intestate * ought to belong of course) then the neareſt of Kindred, coming to obtain Letters of Administration, must first have a Citation, against all and singular next of Kindred to the Deceased, to come, (at a certain day, named in the Citation) and appear before the Judge, and shew cause if they can, why Administration of the Intestates Goods may not be granted to the party, at whose instance, the Citation is obtained; and this Citation is to be published in the Parish Church, where the Deceased inhabited, (whilst he lived) a Sunday or two before the day of appearance: if none appear to shew reasons to the contrary, or that some more of equall degree or interest, (with the party who took out the publick Citation) do appear, then the Administration is granted to them equally. If there is a Will, whose Executor is wanting as above, then that Will is proved, and the Administration of the Deceased's Goods annexed. If the Deceased dyed in debt, the principal Creditor, or any of the Creditors, may use the like proceedings. This practice so long used, (in the Courts of his Grace the Lord Arch-bishop of *York* especially) pleads its own reasons, and necessity, so that no reasons need be shown for it. The Oath taken by the Administrator, is to this following effect. *You*

* *He is said to dye intestate who either makes no Will, or makes it not according to Law, or if being made it is again revoked, or else no executor is named in the will.* Justin. Inst. de hæred. acquir. ab intestat.

*You ſhall ſwear that you believe the Deceaſed dyed without making any Will, and that you will faithfully Adminiſter all his Goods,* &c. *and pay all his debts ſo far as the Goods will extend, and the Law ſhall bind you, and that you will make a true and perfect Inventory of all and ſingular the Goods,* &c. *of the Deceaſed, and likewiſe a true and juſt accompt of the ſame, according to the purport or intent of the Bond by you to be entred, for your due Adminiſtring the ſaid Goods,* &c. For its a great miſtake to impoſe an Oath contrary to the Law; for the form of the Bond they enter was appointed to be taken, by an Act of Parliament, 23. or 24. year of *Car.* 2. which limits them their time, both for an Inventory and Account, *&c.* So that ſooner than that Law limits them, they are not liable, to be called to give either Inventory or Account, as I ſuppoſe. If the Deceaſed leaves Children in minority, then the next of Kindred takes the Adminiſtration to the uſe of thoſe Children, and gives good ſecurity to the Court for their portions. *

* *De hiſce plene reperias apud* Mynſ. *Inſt. de hæreditat. ab inteſtat. ubi copioſe tractatur de Succeſs.*

## CHAP. IV.

### SECT. 1.

### What manner of Cauſes may be tryed in the Eccleſiaſtical Courts.

1. *What this word* [ *Cauſe* ] *ſignifies, and what is here meant by it.*
2. *The Cauſes whereof this Court takes cogniſance.*

1. A Cauſe (called in the Latine *Cauſa*) is defined (by Logicians) That, by whoſe vertue or efficacy, any thing is made to have a Being or Exiſtence; but what Analogy or Coherence, this may have with that which is here intended, I leave to the more curious to determine: The word Cauſe is Metaphorically uſed here, for the word Action; which (amongſt thoſe many ſignifications the Gloſſaries ſeem to put upon it) we ſhall only define to be the right of proſecuting or purſuing (in a Court of Judicature) whatſoever any one ſuppoſes, is properly his due, *&c.* Likewiſe the diviſion of this word,

*Cauſa a caſu.* Lind. *de Senten. ex. c.* 1. *Sect. Item excommunicamus. verb. quacunque.*

word, into Actions mixt, real, perſonal, *&c.* were from the purpoſe to he inſerted here. †

† *Alciat. pr fol. 87, 88. Sect. Cauſarum diviſio. Lanf. de petition. n. 3. de verb Sign. a Seb. Almeri. verb. Actio.*

2. As to the Cauſes whereof theſe Courts take Cognizance, they are theſe following. 1. If Perjury be committed by any Witneſs or principal party (i.e. the Defendant,) in their Depoſitions or Anſwers had or made, in any Eccleſiaſtical Cauſe; the party ſuffering dammage by this Perjury, (or any elſe, as in a Cauſe of Correction:) may promote the Office of the Judge, (for their ſouls good) and proceed before the Eccleſiaſtical Judge againſt the perjured perſon, in a Cauſe of Perjury: or rather may cite him to anſwer certain Articles touching his Souls health, and eſpecially manifeſt Perjury committed, (in a Cauſe depending before the Eccleſiaſtical Judge) to be objected at the promotion of N. And if the party convened be convict of perjury, he is to be Canonically puniſhed, at the diſcretion and will of the Judge; according to the quality of the Cauſe. *Lindwood* Provincial Conſtitutions. *de pœnis. c. Æternæ Sanctio. verb. perjurio.* But it may here be inquired, how the Principal Party (who is wont, for the moſt part to anſwer as to his credulity, and not as to the abſolute truth of the matter) can be convict of Perjury. I anſwer, that if the Principal Party (that is, the Defendant) do anſwer negatively to any Poſition, which contains his proper Fact (and that which he has but lately committed too) he ought to be convict, and condemned as guilty of Perjury, if the Poſition deny'd be proved by witneſſes: But in this caſe, conſult the Learned in the Law, whether the Reſpondent ought to be convinced of Perjury for anſwering as to his Credulity or Belief, * where the matter being his own proper Fact, is recent, and may be preſumed to be within the verge of his knowledge, and freſh in his memory; And although the Defendants do for the moſt part anſwer to the Poſition, containing their own Proper Fact, (as alſo to the other Poſitions, which do not contain their own Proper Fact) I believe or I do not believe, *&c.* I preſume this error has inſinuated it ſelf through the ignorance, or negligence of the Regiſter or Examiner, who takes the anſwer. 2. If a Clergyman has committed Simony in obtaining an Eccleſiaſtical Benefice; he

1. *Perjury.*

* *De hac materia plura reperias apud Lanfr. c. quoniam. de Reſponſ. per tot. & preſertim n. 12. ad rem. facit. & n. Sect. 11*

2. *Symony.*

he may be convened either by the Judge his meer Office, or at the inſtance of a Party, and may be puniſhed according to the Canonical Sanctions; as alſo the Lay-perſons, who are ſharers in that Crime. 3. A Uſurer likewiſe (at leaſt ſuch who lends money to uſe, and receives for the ſame directly or indirectly, above the rate or quantity of ten pounds for every hundred, but not elſe) may be convened and puniſhed by the Eccleſiaſtical Judge. For by the Statutes of this Kingdom, it is prohibited the Eccleſiaſtical Judge to proceed againſt Uſury except the aboveſaid Caſe be made ſufficiently appear. 4. If any lay violent hands upon a Clergy man, or do brawl and quarrel in the Church or Church-yard; he may be convened and corrected, either by the meer Office of the Judge, or by the Office being voluntarily promoted by the Eccleſiaſtical Judge, that is, where the Judge Aſſigns any Perſon to Proſecute. 5. If any one is accuſed of Adultery, Whoredom, Drunkenneſs, Blaſphemy, for being abſent from the Church, or for not contributing his ſhare to the Fabrick of his Pariſh Church, or for the providing Books for the Celebration of Divine Service: He may likewiſe be convened and puniſhed by the Eccleſiaſtical Judge, as above. 6. If any Executor keep in his hands Legacies left to pious uſes, the Eccleſiaſtical Judge may proceed againſt this Executor of his meer Office, or at the promotion of the Church-Wardens, to whoſe Pariſh the Legacy was left, and compel the Executor to the payment of this Legacy by the Eccleſiaſtical cenſures, which ſignifies the ſeverity, vigor, revenge, power or ſentence, whether of Suſpenſion or Excommunication, *&c.* See *Lindwood, de Teſtamentis, C. ita quorundam verb. pias Cauſas*, 7. If any is hindred or obſtructed (by the croſſneſs or peeviſhneſs of ſome perſons intruſted, or other ways concerned) ſo that they cannot duly perform the Teſtators Will, according to the authority granted them, or that they cannot poſſeſs themſelves, or make an Inventory of the Deceaſeds Goods, (they probably (or at leaſt ſome part of them) being in the hands of ſome perſon, who hinders them) in this caſe, the Executor or Adminiſtrator may Implore the Judges Office, and promote it: And the Judge (the Premiſes being proved) may pro-

3. *Uſury.*

4.

5.

6.

7.

nounce the Delinquents to have incurr'd the Sentence of Excommunication Promulged by Law, as in Caſes of Temerary Adminiſtrators: And in theſe Caſes, the Party ſo guilty is not to be abſolved, until he make ſatisfaction (to the Church, and likewiſe to the People) for that thing for which he ſo incurrs the Sentence of Excommunication.

8. 8. If a Rector or Vicar, or ony other perſon ſubſtract from the Arch-biſhop, Biſhop or Arch-deacon, thoſe Procurations that are due to them, by reaſon of their ordinary Viſitation or Synodals; the Party thus grieved, may Sue before the Eccleſiaſtical Judge in a Cauſe of Subſtraction, of

9. Procurations and Synodals. 9. If any Penſion or Yearly Stipend going out of any Colledge, Biſhoprick, Cathedral Church, Deanary, or any other Church whatſoever, and ought to be paid to the Rector or Vicar of ſome other Church, if it be ſubſtracted, they may Sue in a Cauſe of

10. Subſtraction of the Annual Eccleſiaſtical Penſion. 10. If a Rector or Vicar of any Church do make his boaſts, that there are ſuch Tithes, or ſuch a Portion of Tithes, or ſuch a Penſion in ſuch a Pariſh (or by ſuch a Rector or Vicar) due to him in Right of his Church; the Parties grieved, may commence Suit againſt him in a Cauſe of Jactitation

11. of Tithes or Yearly Penſion. 11. If any utter any reproachful Words, (though not Diffamatory) that is, ſuch as denote or preſume any certain crime; for the which words they may be Eccleſiaſtically corrected, (*viz.*) if any out of an angry, malicious or paſſionate mind, utter theſe or the like words: *Thou art an unhoneſt Liver, or thou art a Lier, and careſt not what untruth thou affirmeſt; or thou art no more to be truſted upon thy word than a Dog: Thou art an Arrant Knave; or thou art a Drab, or a Scould, a Jade, a filthy fellow,* &c. Although formerly, this word Knave was not reproachful, but only ſignifying the Male-kind, yet it is otherwiſe now, being accounted by all a reproachful word; and if upon theſe words, no Action lies at the Common Law, then may they Sue for theſe and the like reproaches in the Eccleſiaſtical Court, in a Cauſe of Defa-

12. mation or Reproach. 12. If Fees due to a Proctor in any Eccleſiaſtical Cauſe are ſubſtracted, the Proctor may Sue before the Eccleſiaſtical Judge, in a Cauſe of ſubſtraction of

*See* Lind. de Sententia externis c. 1. *gloſſ. upon the word* quacunque Cauſa. *Sect.* Item excom.

of Fees due to him in an Eccleſiaſtical Cauſe. 13. If one and the ſame Patron hath preſented two Clerks, one to the Rectory, the other to the Vicarage of one and the ſame Church; or if two Perſons having the Advowſon from one and the ſame Patron, have preſented each of them a Clergy-man, and they both are admitted; if one of them deſtroys the Profits, and gather them off the ground, the other has an Action againſt him in a Cauſe of Spoliation or Waſte: The reaſon is, becauſe in this Caſe it is not controverted as to the right of preſentation, for they both derive their Title from one and the ſame Patron, ſo that the right of Patronage is no way injur'd: In many places within this Realm, there are three Rectors in one and the ſame Church. 14. Alſo Cauſes of Subſtraction of Mortuaries, ought to be Tryed and Determined in the Eccleſiaſtical Courts, though they cannot be Sued for, except in thoſe places where they are payable, and according to the rate and value following: *viz.* If the Goods of the Deceaſed, the Debts being paid, amount not to the clear value or ſumm of Ten Marks, nothing ought to be paid; but if above the ſumm of Ten Marks, and under Thirty Pounds, then Three Shillings and Four Pence is due: If the Eſtate amount to Thirty Pound and above, but under Forty Pound, then there is Six Shillings and Eight Pence due: If to Forty Pounds and upwards, then Ten Shillings is due, by Stat. *Hen.* 8. Year *Cap.* 6. 15. Concerning Perſonal Tithes alſo, all Men (*viz.*) Merchants, Buyers, Sellers and Workers of Cloth were wont to pay to the Rector and Vicar of that Pariſh wherein their Family inhabited, and received the Sacrament, the tenth part of their Gain (by the name of Perſonal Tithes) before, or upon the Feaſt of *Eaſter*, for the year then paſt (their Charges being firſt deducted.) Alſo all hired Servants were to pay a tenth part of their Wages, deducting firſt the charge of their Clothes. But theſe Cauſes are now Prohibited by the Statute of this Kingdom, except in ſome caſes and ſome places, in which theſe Perſonal Tithes were payable, for the ſpace of Forty years together before the ſaid Statute came forth, and obſerve, that for the proving and juſtifying of the Cauſes, (*viz.*) to prove the Gain; and the tenth part of the Wages, the Defendant

13.

14. *Mortuaries.*

ſendant (by the ſaid Statute) is not to take his Oath, or to undergo his Examen by virtue of the ſaid Oath, upon the Poſitions of the Libel touching the Premiſes, ſo that the Plaintiff can have no relief in his Proof by the Defendants anſwer, as in other Eccleſiaſtical Cauſes. But the Plaintiff in theſe caſes ought to prove his intention touching the tenth part of the Profit, or tenth part of the Wages by ſome
16. orher means. 16. If in any Village or Hamlet, any Chappel has anciently been founded, and the Rector or Vicar in whoſe Pariſh the Village or Hamlet is Scituate, was wont formerly to celebrate Divine Service there by himſelf or his Curate, if this is denyed to be done, there lies an Action in that caſe before the Eccleſiaſtical Judge, (*viz.*) any Inhabitant of the ſaid Village, may Sue the Rector or Vicar in a Cauſe of Subſtraction of Divine Service in ſuch a Chappel. 17. In divers parts of this Kingdom, and eſpecially
17. *Seats in the Church.* ſome parts of *Wales*, the Seats of the Church, or rather the Right of ſitting and hearing Divine Service in ſuch a Church, belongs to certain particular men, who are Landlords or Owners of Houſes and Dwellings within that Pariſh, and have ſo been time out of mind, ſo that none elſe may be permitted to ſit there: If therefore any Man intrude himſelf into any of theſe Seats, and diſturb the Lord or Owner thereof in his Right of ſitting, and hearing Divine Service there, or do boaſt himſelf to have an equal Right of ſitting and hearing there; in this caſe an Action has againſt this turbulent Perſon, in a Cauſe of diſturbance or boaſting of the Right of ſitting in ſuch a Seat, in ſuch a Church. And if the Plaintiff prove his Poſſeſſion or Right of ſitting and hearing Divine Service in ſuch a Seat, and that the Defendant did either diſturb him, or boaſt a Right as above: He may obtain Sentence for his Right of ſitting there, and his Adverſary is to be reſtrained from this diſturbance and boaſting, and is to be condemn'd in Charges
18. of Suit. 18. If a ſingle Man (that is, one unmarried) (having treated with the Father of that Woman he intends to take to Wife) and gains his conſent, that he ſhall Marry his Daughter, and a promiſe likewiſe of a certain Summ of Money with her in Marriage; but the Marriage being conſummate, the Father refuſes to pay the Summ promiſed;

In

In this caſe the Husband may commence an Action againſt the Father before the Eccleſiaſtical Judge, in a Cauſe of Subſtraction of a Dowry, in conſideration of Marriage, and no Action lies at the Common Law; but it is otherwiſe if he promiſe to pay a certain Summ of money down upon the day, or ſome days after the Marriage; for then an Action lies at the Common Law. Though many years ſince, ſome Eminent Lawyers of this Kingdom were of Opinion, that in either of the aforeſaid Caſes, the Cauſe was to be commenced before the Eccleſiaſtical Judge; the reaſon they gave for this their Opinion was, becauſe theſe Promiſes and Stipulations ſeem to be of the ſame nature with a Matrimonial Contract: And the knowledge and cognizance of Matrimonial Contracts and Cauſes, belong ſolely to the Eccleſiaſtical Judges, thence they draw this concluſion, that theſe ſorts of Contracts ought likewiſe to belong to the Eccleſiaſtical Judges. 19. And it is generally to be noted, that the Eccleſiaſtical Judges may lawfully proceed upon any Cauſe, of which the Canon or Eccleſiaſtical Law takes any cognizance to Try and Determine, ſo as the Principal or Statute Laws of this Kingdom contradict it not, or ſo as no Action or Plea, may be Inſtituted or Commenced for the ſame matter at the Common Law: This has been argued in a Conſultation had between ſome Eminent Perſons, (Learned in the Statute Laws of this Kingdom) ard certain skilful Judges and Advocates of the Court of Arches. 20. And laſtly obſerve, that in certain Caſes, one and the ſame Crime may be puniſhed, both in the Spiritual Courts, and at the Common Law, but not after one and the ſame manner; for at the Common Law they ſuffer as to their corporal puniſhment, but in theſe Courts as to the health of their Soul. *

19.

20.

* *There be other Cauſes not mentioned in this Sect; which are ſpoke of afterwards in this Book.*

## SECT. 2.

## Of the different way of proceeding which Causes require.

1. *Plenary or Ordinary Causes, how defined, and why so called; what manner of proceeding they require.*
2. *Which are the Causes that require such a manner of proceeding.*
3. *Summary Causes why so called.*

THese Causes in respect of their different way of proceeding are two-fold, Plenary and Summary.

1. Plenary Causes or Ordinary Causes, are those which require a solemn Order in the proceedings, as the contestation of Suit; a Term assigned to propound and invoke all Acts, *&c.* a Term to conclude, and a due Form of concluding in that Term, *&c.* and thence it is, they are called Plenary.

2. What Causes these are, that require this manner of Process, must be learnt from those, learned in the Civil Law; however these following Causes by ancient and daily practice, are found to be Plenary Causes (*viz.*)

Every Testamentary business, and contests about Temerary Administrations, except in the Prerogative Court.

All Causes of
- Legacy.
- Diffamation or Reproach.
- Divorce or Separation from Bed and Board.
- Dilapidation.
- Jactitation or boasting of Matrimony.
- Substraction of Procurations.
- Substraction of an Annual Pension.
- Perjury at the Instance of a Party.
- Notorious Simony at the Instance of a Party.
- Correction of the meer Office, or voluntarily promoted.
- Notorious Usury at the Instance of a Party.
- Injection, or laying violent hands upon a Clergy-man at the Instance of a Party.
- Impediment of Marriage.
- Right about Seats in the Church.

And

And it is to be particularly obſerved, that if in any of theſe Plenary Cauſes, any proceed Summarily, that is, without conteſtation of Suit, *&c.* all the proceedings are immediately null.

3. Summary Cauſes are ſuch as reſpect not this Solemn and ordinary way of proceeding in Judgment; but they require a Summary and ſhort proceeding, and (as they term it) *abſque ſtrepitu Judicii, & de ſimplici & plano.* And theſe Cauſes are all thoſe, whereof the Prerogative Court takes Cognizance; for by the Style of that Court, they are all called Summary Cauſes. And if any proceeds Plenarily in theſe Cauſes, the Proceeding is not null'd, but more valid: If therefore the Proctors doubt which Cauſes are Plenary, and which are Summary; they may proceed Plenarily, although the Cauſe be Summary, and by that means avoid all danger of nulling the proceedings. And thus you have had an account of the *Præcognita*, or things neceſſary to be known and underſtood, before we come to ſpeak of the manner and ways of Adminiſtring Juſtice in theſe Courts. We ſhall next come to ſpeak of that which in the Law is properly called *Judicium*, of what Perſons conſtituted, what Acts are preparatory to it, and what Accidents may intervene betwixt thoſe Acts, and thoſe which conſtitute its principal parts, and all this with as much plainneſs and method as is poſſible.

# THE PRACTICE OF THE Ecclesiastical Courts.

## *THE SECOND PART.*

## CHAP. I.

*The manner of preparing for the Administration of Justice in these Courts.*

### SECT. 1.

Of that which in the Law is properly called *Judicium*.

1. *What it is, how divided.*
2. *Of what Persons constituted.*
3. *What Acts are called Preparatory to it.*
4. *What Acts are properly said to constitute its parts.*

THis word *Judicium* * as was said before, is a Judging betwixt the Just and Unjust; or it is said to be that which determines, and puts an end to the Cause or Suit, which are indeed the material parts of it. It is variously divided: In respect of the Ancient Cause, it is divided into Spiritual and Temporal; in respect

* *Judicium quid sit quæ illius partes en latè traditur à Wesemb. parat. ff. 4. De Judiciis per tot. Alciat. prax. fo. 3. & f. 10. & fol. 4. Sect. ratione in form.*

ſpect of the Object, it may be ſaid to be General, Univerſal, Special, Publick or Private, Civil or Criminal, Perſonal, Real or Mixt: In reſpect of the Form, it may be divided into Ordinary (that is Plenary) or Extraordinary (that is, Summary.)

2. The Perſons conſtituting * this *Judicium* are the Judge (who is ſo called a *Jure dicendo*, from his determining the Law) the Plaintiff or Actor (ſo called *ab agendo*, from Acting, becauſe he firſt provokes the Judge) the *Reus* or Defendant (ſo called *à Re* from the matter or thing, for whoſe cauſe he is convened.) And likewiſe thoſe Perſons who are called *Judicio Aſſiſtentes*, thoſe who aſſiſt in Judgment, as firſt, thoſe who aſſiſt the Parties in controverſie (*Scil.*) the Advocates (called the Patrons of the Cauſes) and the Proctors. Secondly, Thoſe who aſſiſt the Judge (*Scil.*) Aſſeſſors (which are ſo called becauſe they aſſociate or attend the Judge: See their Office in *Weſembecy*) the Notaries, Scribes, Actuaries, Apparitors.

* *Weſemb. paralit. ff. de jud. per tot. & in n. 9,10,11,12. Chilian. in prac. c. 22.*

3. That which (according to *Weſembecy*) is called Preparatory to Judgment, (but is no eſſential part of it) is the Citation and the mediate parts (*Scil.*) the Proofs made in the Cauſe †. But *Mynſinger* proves the contrary, (*Scil.*) that the *Jus vocatio* this calling to Juſtice, or the Citation, is to be accounted for the very foundation of the Judicial Order, being as it were the Cauſe *ſine qua non.*

† *De Judicii parat. ff. n. 6. Alciat. prax. fol. 1. Sect. Subſtantia judicii, & fol. 10. Sect. Judicii prepa-ratio.*

4. The Conſtitutive or Eſſential Parts of this *Judicium*, are Firſt, the *Litis Conteſtatio*, the conteſting or joining Suit: For before the Judgment or Conteſt is begun (which is not before this part of the proceeding call'd the *Litis conteſtatio*) we cannot be ſaid to ask any thing. The Second Part is the Sentence, which is the Judges pronunciation upon a Cauſe depending betwixt two in controverſy.

SECT.

## SECT. 2.

## Of the foundation or beginning of this *Judicium*, which is the Original Citation.

1. *What a Citation is.*
2. *What it ought to contain.*
3. *The differences of Citations, and by whom obtained.*
4. *To whom directed, and by whom, and how Executed.*
5. *How certified.*
6. *An Authentical Certificate, what it is, and how made.*

† *Quæſit, quotuplex, qua forma, & quid debet contineri, & in qua forma vel ſolemn. debet certificari, plenius traditur à Weſemb. in parali. ff. tit. de in jus vocando per totum. Maranta in Specul. aureo c. de citat. Socinus de citat. art. 20. Lantr. de Citation. per totum. Weſemb. parat. in Cod. l. t. per tot. Mynſ. Obſ. 79. Cent. 1.*

1. A Citation †, or this *Jus Vocatio*, is a Judicial Act, whereby the Defendant by authority of the Judge, (the Plaintiff requeſting it) is commanded to appear in order to enter into Suit, at a certain day, in a place where Juſtice is Adminiſtred.

2. The Citation ought to contain, Firſt, The name of the Judge (and his Commiſſion, if he be delegated;) if an Ordinary Judge, with the ſtile of the Court where he is Judge; 2. The name of him who is to be Cited. 3. An appointed day and place where he muſt appear; which day ought either to be expreſs'd, particularly to be ſuch a day of the Week, or Month, *&c.* or elſe only the next Court day (or longer) from the date of the Citation, in which the Judge ſits to Adminiſter Juſtice: The time of appearance ought to be more or leſs, according to the diſtance of the place where they live. 4. The Cauſe for which the Suit is to be commenced. 5. The name of the Party at whoſe inſtance the Citation is obtained. Theſe words may alſo be added, (*Scil.*) if the ſaid day be a Court day, or otherwiſe, the next Court day following, in which the Judge happens to ſit to Adminiſter Juſtice. The reaſon of this is, leaſt that day of the Month ſo particulariz'd in the Citation, ſhould happen to be a Holy-day, which (as was ſaid before) is no day for Adminiſtring Juſtice.

3. As to the differences of Citations, they are ſuch as contain either a peremptory command to appear, or elſe are Mandatory and Inhibitory, where the Defendant is not only

only warned to appear; but the Judge before whom the Cauſe lately depended, is forbid to proceed any further: Or elſe they are Mandatory and Intimatory; As where Executors of Wills do not only Cite all the next of Kin to appear and ſee the Wills proved, but do intimate to them, that if they appear not, they intend to proceed, *&c.* Likewiſe Citations (in reſpect of their end) may be ſaid to be, either general (as where the Defendant is Cited to attend the whole Cauſe and Order of proceedings) or ſpecial (as where the Defendant is only Cited to do, or perform ſome particular Act to be done in the proceedings, *&c.*) Alſo in reſpect of its form or manner of Execution, a Citation may be ſaid to be Publick, (that is, that which is Executed by a publick Edict in the Church, *&c.*) or elſe Private, (which is either verbally Executed upon the Defendants Perſon, or by notice thereof left at his houſe) or laſtly, a Citation may likewiſe in this reſpect be ſaid to be Real, being Executed upon the Goods, as in Maritime Cauſes, *&c.*

The Original Citations, (which are only Mandatory or Intimatory, *&c.*) may be obtained by the Plaintiff himſelf, or any Solicitor he employs to go to the Court in his name, the other which we diſtinguiſh by the name of Inhibitory Citations, (being for the moſt part, iſſued forth upon Definitive Sentences, or other grievances done to the party complaining, by the inferiour Judges who are called thoſe from whom it is appealed) are obtained (with much eaſe) of the Judges of the Arches and Audience, by the Party concerned, or his Proctor, who carry the Citation and Inhibition (ready drawn in writing, and fit for the Seal) to the Judge, the Seal of whoſe Office they having requeſted, is immediately put to them. It is apparent, that formerly (for the ſpace of a hundred years, as appears by the Records of the Court of the Arches) all Citations and Inhibitions were wont to be drawn by the Proctors, and not by the Apparitors, Solicitors, and other unskilful Perſons, as is too frequent in the ſaid Courts of the Arches to their great diſgrace, and oftentimes to the prejudice of the Parties in Suit.

4. Theſe Citations are uſually directed to all Rectors, Vicars, (as Mr. *Clarke* ſays) Chaplains, Curates, Clerks, and

and literate perſons whatſoever, or whereſoever conſtituted, throughout the Province of *Canterbury*, or they may be directed to any one (or more) particular perſons (who muſt be named in the Citation) giving him or them power to execute the ſame: So that every literate perſon, who can read any thing that is Written or Printed, (though he underſtand not the Latin Tongue) may be accounted a fit Mandatory to execute the ſaid Mandate; in doing of which he ought to obſerve this: (*Scil.*) He ought to ſhew the Party Cited his Letters Mandatory, under the common Seal of the Judge, and by vertue thereof, he ought to Cite the defendant, to appear in ſuch a place, and at ſuch a day (as mentioned in the Mandate) and before ſuch a Judge, to anſwer the plaintiff (naming him) in a Cauſe of *&c.* and if the Party Cited, requeſt a copy of this Citation, the Mandatory ought to give him a Copy, and receive only Sixpence for that Copy, if it be an ordinary or uſual Citation, that is to ſay, if he be to anſwer in a Cauſe of Subſtraction of Tithes, Diffamation or Legacy, *&c.* But if it be an extraordinary Citation, containing an Inhibition, or Intimation, and much in length; then he may ask Twelvepence for the Copy of it if he will. Mr. *Clerk* ſure, does not intend, that ſuch a Mandatory as he ſpeaks of, ſhould Execute an Inhibition: If he does, it is a thing not reaſonably practiſed; for one of our Learned'ſt Notaries ſeems to have Learning little enough, to read over the Contents of an Inhibition (to the Judge or Regiſter on whom it is to be Executed) and to explain their *Ars Notariata* Grammatically.

5. The Mandatory ought to be perſonally in Court before the Judge, to certify and make Oath, how, and in what manner the Defendant was Cited; or elſe the Mandatory, or the Plaintiff himſelf ought to certify his Proctor before the day of appearance, the name of him who Executed the Citation, and the day and place in which he Cited the Defendant, that ſo the Plaintiffs Proctor may draw an Authentical Certificate thereupon. In ſome Courts, If a Mandatory (who is known to be a perſon of Credit) writes a Certificate to the aforeſaid purpoſe, it is good, without an Authentical Certificate.

6. This

6. This Authentical Certificate is a kind of ſolemn writing, drawn or confirm'd by ſome publick authority, and ought chiefly to contain the name of the Mandatory, and therein is directed to the Judge with his wonted Style; likewiſe the day and the place in which the Defendant was Cited, and the cauſes of his appearance; In Teſtimony whereof, ſome Authentical Seal ought to be put to it, (*viz.*) of ſome Arch-deacons, Officials, Commiſſaries, or Rural Dean's Seal: To all which Certificates in all Cauſes, ſince the Memory of Man (by the Style of theſe Courts) there was as much Credit given, as if the Mandatory had perſonally made Oath of the Execution thereof. See *Lindwood*, Conſt. Othob. §. *De Sigillis autent. & cuſtod. eorum.* But the Party grieved by this Certificate, (if it prove fictitious and falſe) may object againſt, and oppoſe it by way of Appeal: And they, who ſet their Authentical Seal to it, ought to undergo the Penalty contained in the Conſtitution of *Othobon*, §. *Quæ litteræ falſæ dicuntur, & pœna eorum qui eiſdem uti præſumunt:* See the gloſs upon the words, *hujus Scripturæ pœna falſariis debita, &c.* And it is to be obſerved, that the Arch-deacon, Official, Rural Dean, *&c.* who ſet their Seal to the ſaid Certificate, ought to certifie that they put it to at the ſpecial inſtigation and requeſt of the Mandatory, or elſe it avails not, this has been objected and with ſucceſs.

## CHAP. II.

### *Of Proctors and their Office in bringing in theſe Citations.*

### SECT. 1.

### Their manner of Conſtitution.

1. *What a Proctor is.*
2. *Their ſeveral Ways of Conſtitution defined and ſhewn.*

The

THe next thing conſiderable in order, ſeems to be the Proctor, his Power and Office, *&c.* ſeeing no Citation, though Executed can be brought into Court, but by the Proctor, nor any notice taken of it, unleſs Exhibited by him. Therefore among the ſeveral diviſions of Proctors (in reſpect of their Offices) we ſhall only make uſe of that definition beſt fitting our purpoſe, and in this place it is *Procurator Judicialis* a Judicial Proctor * which is intended; (that is) he who manages any ones concern in a Court of Judicature, by the ſpecial Mandate of his Client. The diviſion of Judicial Proctors, See in *Mynſ. Inſt. de Action. F.* 10.

2. A Proctor is conſtituted either by Proxy, † or *apud acta Curiæ*, or before a Notary Publick, and Witneſſes. A Proxy (which *Weſembecy* ranks in the number of Extra-judicial conſtitutions; as alſo the other before a Notary Publick) is a Power or Mandate given to the Proctor by his Client to appear for him, and to do all things for him which he might poſſibly do, if he were perſonally there himſelf, with power to ſubſtitute another in his ſtead, ſo often as he ſhall be abſent upon urgent occaſions. And that it may be valid and authentick, it ought to contain the name of the Party conſtituting, the name of the Proctor conſtituted; alſo againſt whom, in what Cauſe, before what Judge, and to what Acts he is conſtituted (*viz.*) to act, offer, or receive a Libel, to except, conteſt Suit, produce Witneſſes, hear Sentence, *&c.* in which reſpect theſe Mandates or Proxies may be ſaid to be either General (giving full Power to proſecute the whole Cauſe while it is controverſie) or Special (which gives power only to do or perform ſome particular Act, *&c.*) and this Mandate, that it may be Authentick, muſt be Sealed in the ſame form, as Authentick Certificates (before mentioned) are Sealed; of which ſee *Lindwood*; *Conſtitutio Othoboni C. de Officio procuratorum:* Theſe Mandates ought likewiſe to make mention, that they are ready to confirm whatſoever their ſaid Proctor ſhall do in the Premiſes. Another ſort of Extrajudicial Conſtitutions is that which is made before a Notary Publick, who draws up a publick Inſtrument thereupon, and

* *Fide Procur. l. 1. l. 71. l. 72. Cod. eodem Umm. diſput. 3. th. 1. n. 2. Jac. Bouric. de Officio Advocati c. 1. 2. Specul. hoc tit. in rub. eodem n. 1. Weſemb. ff. de proc. n. 1. 2.*

† *Quoad formam & materiam conſtitutionis vide Weſemb. ff. de procur. numb. 5. & 6. per tot. Mynſ. obſ. 46. 1. hoc tit. Maranta in Specul. par. 4. diſt. 1. n. 35. in Pract. & Spec. in tit. de procur. Sect. rationæ form. num. 13. 19. & n. 4. Cujacii obſerv. l. 7. c. 26. Chilia in prac. 12. n. 2.*

and exhibit it into Court; and likewiſe a Proctor is conſtituted before two or more Witneſſes, who give their Teſtimony concerning this Conſtitution of the Proctor. A Proctor is only then ſaid to be properly Conſtituted Judicially when the party conſtituting is preſent in Court, and makes choice of his Proctor before the Judge, and confirms his Perſon, and promiſes to ratifie whatſoever his ſaid Proctor ſhall act or do, (which Election he deſires may be put into the Court Act) or when he, or ſome in his name, offer to the Judge a Letter, or other Writing, which makes appear whom he makes choice of for a Proctor; the contents of which is to be inſerted in the Acts of the Court. Mr. *Clerk* ſeems to reckon a Conſtitution before a Notary Publick to be a Judicial Conſtituting of a Proctor, but the miſtake will eaſily appear by *Weſembecy* ff. T. *De Procurator.*

## SECT. 2.

## How, and when Proctors may be Subſtituted.

1. *What a Subſtitution is, and the ſeveral kinds of it?*
2. *When a Proctor may Subſtitute another in his ſtead in any Cauſe.*

A Subſtitution is the putting any one in his ſtead, giving Power to Act in his abſence. There are ſeveral ſorts of Subſtitutions, ſome are Teſtimentary (which are likewiſe either General or Special) others Pupillary; others ſuch as are made by the Officers or Aſſiſtants in Courts of Controverſie, which agrees properly with the Definition here mentioned.

2. And though a Proctor has power given by his Proxy to Subſtitute any other in the Cauſe, ſo often as he ſhall be abſent from the Court; yet he cannot Subſtitute any Proctor before the conteſting of Suit called the *Litis Conteſtatio*, becauſe he is not (till then) either Lord of the Suit or Controverſie, nor can it (properly) be called a Suit: But after this *Litis Conteſtatio*, or conteſting of Suit, all things whatſoever acted or done by the Subſtituted Proctor are valid, and

and good in Law, as if done by the Original Proctor, *Wesemb. ubi S.*

## SECT. 3.

### When a Proctor is said to cease to be Proctor in a Cause, and when not.

THe General Rule is, *Unumquodque dissolvi eodem modo quo Colligatum est*; every thing ought to be dissolv'd after the same manner, (that is) by the same power it received its Being; so that a Proctor (being constituted by mutual consent) may likewise be released after the same manner. But this General Rule admits of several limitations, though before the Suit is contested, (in which state the Civilians term the business to be, *uti res integra*) the Proctor may be revoked * or changed: The several Causes of Revocation are at large Enumerated by *Wesemb.*. Likewise the Client dying before the Suit is contested, though the Proctor has Exhibited his Proxy, and accepted the Libel, *&c.* Yet he needs not further defend the Suit, but may let his Adversary call the Executors or Administrators of his Deceased Client, and begin Suit a new, if any Action lye against them for that fact, but it is otherwise, if the matter ceases to be *integra* or whole, that is, if Suit has been contested. And on the contrary, if the Proctor dyes after Suit is contested, the Mandate is absolutely revoked †, though the Substitution made by that Proctor, after the Suit so contested, is not absolutely revoked by the Death of the party Substituting. Also the Proxy is said to be revoked when the Instance is ended, (*viz.*) Sentence being given in a Cause, and a protestation of an Appeal being interposed; * nor can the Proctors Act or do any thing on either Party, except they exhibit their Proxy for their Client anew, after the Sentence is laid, which often happens when the Proctor appealing, comes before the Judge (from whom he appeals) and alleadges that he has so appealed, and desires dismission, *&c.* or when the party appellant, who got the Cause, comes and demands Sentence to be put in Execution.

* *ff T. de procur. Zouch. Elementa Jun. Peud. p. 5 Sect. 8. Sect. & procur. Mynſ. Inſt. T. de Mand. Sect. Rectè.*

† *Ranch. ad Guid. papam q. 119.*

* *Weſemb. ubi S. Berlachin. repert. verbo procuror. appellans. verbis qui eum item verbis. 234.*

tion. And though the Appellate do obtain Sentence of remiſſion, and do preſent this Letter of remiſſion to the Judge from whom it was appealed; yet he can do nothing in the preſence of his Adverſaries Proctor, but muſt call the principal party by new Proceſs, in like manner whether it is appealed or not: After Sentence is given, the Party who got the Sentence, muſt call the Adverſe Party by way of Proceſs, to ſee the Sentence put in Execution, and both of them muſt Conſtitute their Proctors as at firſt.

But if the principal party dye after the Suit has been conteſted by the Proctors, the Proctor of that party ſo dying, (whether Plaintiff or Defendant) is (by the Conteſtation of Suit, *res nimirum deſinens eſſe integra*, as the Civil Law calls it) made Lord of the Suit, * and may Proſecute and Defend the Suit, and do all things which ought to have been done, if the principal Party had been alive; and likewiſe obtain a Definitive Sentence, but we muſt diſtinguiſh betwixt Real and Perſonal Actions; for all Actions that are Perſonal † do dye with the Perſon, ſuch as are Actions or Cauſes for Diffamation or Matrimonial and ſuch like: But in Real Actions which any way reſpect the Goods, or the Right any one pretends to a Perſonal Eſtate, *&c.* then what is above ſaid takes place. Likewiſe if any Appeal from any pretended grievance which they ſuffer in the Proceedings before the Definitive Sentence, and the Judge to whom it was appealed, pronounceth that it was unjuſtly appealed, and thereupon remits the Cauſe back to the Judge, from whom it was ſo appealed, and the party Appellate, Exhibits the Letters Remiſſary before the Judge, from whom, *&c.* and makes requeſt that they may proceed * according to the former Acts, and in the ſame ſtate in which the Cauſe was, at the time of the Appeal in this Caſe, the Proctor of the party Appellate, may in the preſence of the Proctor who appealed, Act and do all things, as if it had not been appealed at all: For the Proctor of the Appealing party, (nor of the other party ſure) does not ceaſe to be Proctor; if the Appeal be made from ſome grievances committed after the conteſting of Suit, but before the Sentence, ſeeing the Procuratory Mandate is of force until the Definitive Sentence. And thenne it happens,

* *Zouch Elem. Jur. prud. p. 5. Sect. 3. Sect. Et procuror.*

† *Inſt. Sect. ovum. de Succeſ. Myns. Gravat ad veſt.*

* *Gail. l. 1. obſ. 109. n. 3 4. 5; &c. Grav. ad veſt. l. 4. c. 4. n. 39. verbo niſi forte.*

that the party Appellate needs not (in this ſort of Remiſſion) call the principal party who appealed, to ſee further proceedings as above.

Having now conſidered this Animal (called a Proctor) in his Original State, and thoſe other adventitious circumſtances he may perchance fall under; let us now proceed to the *Hoc Age*, the buſineſs he is to do with its manner and form.

## SECT. 4.

## The manner of bringing Citations into Court by a Proctor.

1. *How the Citation is Exhibited by the Proctor.*
2. *The Party to be Cited not being found, how muſt it be certified.*
3. *The Citation* Viis & Modis *defined, how obtained; how executed, and how certified and brought into Court.*

HAving preſuppoſed the Proctor to be Conſtituted in ſome of thoſe forms afore-mentioned, we are to conſider his manner of appearing in Court. Firſt, Therefore the Proctor of the Plaintiff in that day, on which the Defendant is ſummoned to appear, is to exhibit his Proxy for his Client, *&c.* and brings into Court the Original Citation.

2. Now this Citation being a perſonal Citation, (that is to ſay) ſuch a one as could not be Executed, unleſs upon the proper Perſon of the Defendant, and the Party ſo to be Cited, having perhaps abſconded himſelf, that he cannot be met with: In this caſe the Proctor ought to alleadg it, and ſhew the Mandatories Certificate purſuant to ſuch his alleadgment; and thereupon he ought to Petition, that the Defendant may be Cited perſonally to appear (if he can ſo Cited) to anſwer the contents of the former Citation, and if not perſonally, then by any other ways and means, ſo as the *Pars Rea*, or Party to be Cited, may come to the knowledge thereof, and this is it which is called *Citatio*

*vira*

*viis & modis*, or *Citatio Publica*, a Publick Citation, being it is Executed either by Publick Edict, (a Copy thereof being affixt to the Doors of the Houſe where the Defendant dwells, or the Doors of the Church, within whoſe Pariſh he Inhabits) or (as my Authour tells me) by Publication in the Church, in time of Divine Service; or *per Campanam* the Toling of a Bell, or *per Tubam* the ſounding of a Trumpet, *& vexilli erectionem* the erecting of a Banner. This being done, a Certificate muſt be made of the Premiſes, and the Citation brought into Court, (as is even now mention'd) and if the party Cited appear not, the Plaintiffs Proctor muſt accuſe his Contumacy, (he being firſt three times called by the Cryer of the Court) and in penalty of ſuch his Contumacy, he muſt requeſt, that he may be Excommunicate.

## CAAP. III.

### *Of Excommunications.*

### SECT. 1.

1. *What an Excommunication is, and the ſeveral ſorts of it.*
2. *How obtained, and againſt whom, and in what caſes.*
3. *How denounced.*

'TIs poſſible, many things may intervene before the parties appear face to face in Court, one reaſon may be the Defendants obſtinacy in not appearing; ſo that the only remedy the Plaintiff has in theſe Courts in ſuch a caſe, is by way of Excommunication; which we ſhall conſider in all reſpects.

1. An Excommunication in General, is a Power or Authority Inveſted in the Church; * which ſecludes thoſe on whom it is inflicted, from having or maintaining any Communion or Society with thoſe who are Members of the Church; and this is two-fold, the one is the major or great-

* *Vide manual. juris de verb. ſign. à Sebaſt: Almers. verb. excommunicatio.*

er Excommunication, which ſeparates thoſe on whom it is inflicted, not only from the myſtical Body of the Church, and from Spiritual Communion, or receiving the Sacraments, as well Actively as Paſſively, (that is, that they may neither receive them themſelves, nor adminiſter them to others) but alſo from the Society of the faithful, as well in Humane as Divine Affairs. The other ſort of Excommunication is called the minor or leſſer Excommunication, bein that which ſeparates only from the Paſſive Communion of the Sacraments (that is, the receiving of them) but does not forbid the Adminiſtring of them; and both theſe are inflicted either by the Law, or ſome Canon, or ſome general or particular Synod, (which is perpetual, and thoſe who commit thoſe Crimes for which this penalty is ſo afflicted, are ſaid to be Excommunicated *ipſo facto*; of which ſee *Lindwood, de Sententia Excommun. C. ult. gloſs. ult.*) or ſecondly, Theſe ſorts of Excommunications may be inflicted by the Sentence of a Judge, when, and as he ſees occaſion to puniſh the contemners of Eccleſiaſtical Juriſdiction.

2. Theſe Excommunications to be inflicted upon thoſe who are contumaceous in not appearing, *&c.* are obtained by the Proctors Petition to the Judge. For the Citation (either perſonal, or *viis & modis*) being duly executed, and brought into Court as is before directed, and the party Cited being ſo propounded contumaceous, and decreed Excommunicate; the Plaintiffs Proctor offers a Schedule of the Excommunication to the Judge, who reads it; if he be in Holy Orders, if not, then it is given to one who is in Holy Orders, who is conſtituted to this purpoſe by the Judge: This Schedule being read, it is left in the hands of the Regiſter, who makes the Excommunication thereupon. But the Letters of Excommunication, ought not to paſs under the Office Seal; at leaſt, they ought not to be delivered out of the Office that ſame day, in which the Sentence of Excommunication was pronounced; for the party Cited has a whole day allowed him for his appearance, ſo that if he appear in any time of the day (though after the Court) in which he was Cited to appear, and does conſtitute his Proctor (who in that ſame day exhibits into the Regi-

Regiſters Office an Authentick Certificate for the Defendant) he ought to be abſolved from the ſaid ſentence of Excommunication without paying contumacy Fees, (paying only Sixpence for the Act, and for reading the Schedule of the Excommunication) and this appearance (whether by himſelf or his Proctor) being in that ſame day, is by the Style of the Court called a good appearance. As for thoſe who are liable to this ſort of penalty, they are not only ſuch as are before hinted at (*Scil.*) ſuch as diſpiſe and contemn the Eccleſiaſtical Juriſdiction in not appearing, *&c.* (whether Witneſſes or others) but likewiſe all thoſe who are ſaid to incur the penalty *ipſo facto*: In thoſe caſes enumerated by Dr. *Lindwood*, *de Sent. Excommunicationis C. ult. gloſs.* upon the words *Candelis accenſis*; and in eſpecial manner, all thoſe who are converſant, or hold any Communion with an Excommunicate perſon. And to this end (not only by the Laws of the Land, but by antient and modern practice) it is provided, that every Excommunicate perſon be publickly denounced Excommunicate in the time of the Divine Service, Celebrated within the Pariſh Church where he lives, whiles the greateſt part of the multitude is preſent, that ſo by this means not only the Excommunicate perſon himſelf, but likewiſe all other the Pariſhioners of that Pariſh may have notice thereof, ſo as that they may have no converſation with them after they are ſo Excommunicated, unleſs it be with deſign of reconciling them to the Church, or in order to procure them their Letters of Abſolution: And theſe Perſons being otherwiſe converſant with them, are Convict and Excommunicate *ipſo facto*, and as ſuch are to be denounced *, and pennance enjoined them before they are Abſolved with Condemnation of Expences. Let all people therefore obſerve thus much, that this Sentence of Excommunication, is not a thing of ſo light a value, as many ſuppoſe them; becauſe not only by the Eccleſiaſtical Law (approved by the Laws of this Realm) the Eccleſiaſtical Judge may proceed againſt them, and thoſe who are converſant with them as above; but alſo if they ſtand Excommunicate for the ſpace of twelve Months after the Excommunication is denounced; the Eccleſiaſtical Judge may proceed

*Lind de Immun. Eccleſ. c. Seculi princip. Sect. Ac quandoque verb. maculan.*

* *They muſt be Cited firſt. Lind. ubi ſupra c. Quia divinis. Sect. ult. verb. Rite. See how many ways it is ſaid to be deſpiſed, de ſent. excom. c. 1. gloſs. ult.*

ceed againſt them in a Cauſe of notorious hereſie *. Neither have theſe Excommunicate Perſons any benefit of the Laws of the Land (either Spiritual or Municipal) more than thoſe men who are called *Bannati*, or Outlawed. Many other penalties are inflicted upon them by the Eccleſiaſtical Law, for they are not only ſecluded from the ſociety of men whilſt alive, but when they are dead too, being forbid Burial either in Church or Church-yard.

* *Lind. de hæret. c. finaliter Sect. ad hæc verb. vehementer ſuſpecti verb. Originis. Jo. An. Sup. quinto decretal. in Rub. circa finem & c. 3. verſus finem de her. de her. l. 2. de preſump. c. literas & not. per Archi. e.t.*

3. The Letters of Excommunication being ready under the Judges Seal as afore-mentioned, the Plaintiff, or other Perſon concerned, muſt ſend the ſame to the Rector, Vicar or Curate of the Pariſh, to which the Excommunicate Perſon belongs, with orders to publiſh the ſame, in time of Divine Service upon ſome Holy-day or Lords-day. The which being denounced, the Rector, Vicar, Curate, or other Prieſt who denounced the ſame, ought to make Certificate of ſuch Publication, either Perſonally, or by his Letter, or by his Certificate annexed to the ſame, containing the Name and Sir-name of him who denounced them, the day and place where they were publiſhed; then they ought to be delivered to the party at whoſe inſtance they were obtained, and ought to be certified in due time. In order whereunto likewiſe the Parties who take out theſe Letters of Excommunication, ought to take care that they be delivered to the Rector, Vicar, or Curate aforeſaid, a day before that Lords-day, or Feſtival, in which they would have them denounced, or at leaſt that ſame day before Morning or Evening Prayers, that ſo he may read them, and do what belongs to his office. And in this caſe, the Rector, *&c.* (having ſuch timely notice for the publiſhing of theſe Letters of Excommunication as aforeſaid) ought to take care that they be publiſhed without delay, and being ſo publiſhed, that they be delivered and certified as above; for if they neglect ſo to do, they are to be puniſhed (by ſuſpenſion from their office) by the Judge who ſends forth theſe Letters of Excommunication. For they ought to remember that they are ſtrictly commanded by the ſaid Letters of Excommunication, not only to publiſh the ſame forthwith, but alſo to certifie the Judge who granted

them

them concerning the day, the manner and form wherein they publiſhed them.

## SECT. 2.

## The manner of proceeding againſt Excommunicate Perſons.

1. *Thoſe who ſtand obſtinately Excommunicate until the fortieth day, and ſeek not for Abſolution until then: How they are proceeded againſt.*
2. *Thoſe who having been formerly abſolved from the Sentence of Excommunication, if they were the like again, how they may be puniſhed.*
3. *What the Letters of* Significarit *for Arreſting an Excommunicate Perſon are, how, and when obtained; and how the Writ is obtained upon them.*

IN theſe days, the malice and contempt men bear towards the Eccleſiaſtical Juriſdiction is ſo great, that (out of a reſolution to protract Suit) they ſtand Excommunicate ſometimes thirty, ſometimes thirty eight or thirty nine days, and then on the fortieth day (to avoid impriſonment by the Kings Writ, *de Excommunicato Capiendo*, and the expences of Suit they are liable to upon that occaſion, being drawn to it by no remorſe of conſcience) they come and deſire their Abſolution; boaſting that they can have their Abſolution before forty days be elapſed, paying only Contumacy Fees: Therefore to avoid the evil, the Eccleſiaſtical Judges may if they pleaſe proceed (of their meer office, or at the promotion of the party, who ſuffers by retarding the Suit) againſt theſe Excommunicate Perſons, and contemners of Eccleſiaſtical Juriſdiction, and unleſs they produce ſufficient and concluſive reaſons for their ſtanding ſo long Excommunicate (*viz.* becauſe they were beyond Seas, or in ſome remote parts of the Kingdom at ſuch time as the Excommunication was denounced, and for at leaſt thirty days after) they may be enjoined pennance, and may be condemn'd in expen-

ces made in that behalf, beſides the Contumacy Fees; and by this means they will be deterr'd from ſuch an audacious contempt for the future; and then the Poets words may be fitly applied to them,

*Oderunt peccare, mali formidine pœnæ*
*——& non virtutis amore.*

by this means alſo, Suits will be much abbreviated, of whoſe tediouſneſs there is too general a complaint: For if the Defendant ſhould Excommunicate as aforeſaid, before he appear by himſelf, or his Proctor to anſwer in any Cauſe, or if being Cited to anſwer Perſonally to the Poſitions of a Libel, he do obſtinately ſtand Excommunicate for the time aforeſaid before he anſwer, or if having given his anſwer, he neglects to undergo his Examen (that is an acknowledgment he ought to make thereof before the Judge, owning that, his anſwer to be true) within the time appointed him for that purpoſe; and for that reaſon he is alſo Excommunicate, and ſtands ſo, in form as aforeſaid; or if being examined, he does perhaps refuſe to anſwer to ſome one Poſition; or, ſays he, is not bound by Law to anſwer to ſuch a Poſition. This matter being determined, and the Judge delivering his Opinion that the Defendant has not anſwered fully, and that he ought to be called to make a full anſwer; or if he deliver his Opinion that he ought to anſwer to that Poſition which he has abſolutely refuſed to make anſwer to, and does order the Defendant to be Cited, to make his anſwer to it accordingly: If I ſay the Defendant being lawfully admoniſhed to make anſwer to the Premiſes, but takes no care to anſwer accordingly, but he becomes Excommunicate for ſuch his contempt, and continues in that ſtate by the ſpace aforeſaid; or (laſtly) if any one being condemned by a diffinitive Sentence to the payment of a Legacy, Tithes, or the like, and being admoniſhed to ſatisfie the Sentence, does run the hazard of an Excommunication, and does ſtand ſo Excommunicate by the time aforeſaid, before he doth ſatisfie this Monition. Theſe I ſay are great cauſes of deferring the Proceedings, and the determination of Cauſes,

ſes, to the great ſcandal and contempt of the Eccleſiaſtical Juriſdiction; and truly it is, an *Ænigma* not eaſily unfolded (*Scil.*) to determine whether the obſtinacy, and litigious humour of the Party in Suit; is the abſolute Cauſe of this delay and contempt, or his Proctor. Therefore it is vere requiſite in all the aforeſaid caſes, that the Judges for the future proceed of their meer office againſt theſe manifeſt contemners, and correct them duly, (yea, even with publick pennance) eſpecially if they do dare, to run the like penalty of Excommunication a ſecond time.

2. But as for thoſe who are ſo obſtinate, as to dare to incur this penalty a ſecond time, in not obeying the Law, nor ſtanding to the Mandates of the Church, (if they cannot lawfully acquit themſelves of this ſecond Contumacy) the Eccleſiaſtical Judge may proceed againſt them in a Cauſe of Perjury; for they having been formerly Excommunicate, are preſumed to have taken the Oath, [*de parendo Juri, & ſtando Mandatis Eccleſiæ*] at ſuch time as they were abſolved from that their firſt Excommunication, (ſeeing no man ought by Law to be abſolved before they take that Oath) and therefore by this their ſecond contempt, they have violated that Oath, and are become perjured, and as ſuch ought to be puniſhed; but this is rarely practiſed: However let theſe Excommunicate Perſons take heed how they perſiſt in an Excommunication, after having taken this Oath.

3. We come now to another ſort of puniſhment to be inflicted upon thoſe who obſtinately perſiſt in the Sentence of Excommunication, until thoſe forty days be elapſed, which are allowed them to ſeek their Abſolution in; and in effecting this ſort of puniſhment againſt theſe Contemners of the grace of Humiliation, (as the Provincial Conſtitution terms them) the Legal or Secular Authority is to be implored *, which is done by a Certificate made to the Secular Judges, making mention, that the Party Certified has ſtood Excommunicate above forty days, *&c* and thence it is called ſignificatory. This Certificate is obtained by the Proctor of the Plaintiff, who goes to the Judge (who granted the Letters of Excommunication) and exhibits theſe Letters of Excommunication with a Certificate,

* *Dr. Cozens Apol. p. 1. c. 2. Fitz. nat. br. p. 64. Lind. de Immun. Eccleſ. C. Seculi principes. de Sententen. excommun. c. præterea contingit. See the penalty of denying this Writ.*

tificate, making mention that they were denounced againſt ſuch an one, at ſuch a time and place; and the Proctor ought to alleadge, that he hath ſtood in this Sentence of Excommunication, with an obſtinate mind forty days and more, ſince the denouncing thereof, and that he does yet ſtand ſo Excommunicate in contempt of the Eccleſiaſtical Juriſdiction: Whereupon the Judge at his Petition decrees, that he may be ſignified to the Kings Majeſty in Order to the taking of his Body. Then the Plaintiff or his Proctor ſhall get theſe Letters ſignificatory, under the Seal of the Judge, (who granted the Excommunication) directed to the Kings Majeſty; which ought to be delivered to the Chancellour, or ſome other Officer appointed for this purpoſe in the Court of Chancery, from whom they muſt have the Writ *de Excommunicato capiendo*, directed to the Sheriff of that County, in which the Excommunicate Perſon dwells; and theſe Perſons ſet apart for this purpoſe in the Court of Chancery, are certain Clarks, who are called [*the Curſitors of the Chancery*] one of which are aſſigned for every County to diſpatch Writs upon theſe *ſignificavit's*. If the Excommunicate Perſon be Apprehended upon this Writ, he is to be kept in Priſon until he ſatisfie * the Church for his contempt, and his Adverſary for his Contumacy Fees, *&c.*

* *Lind. de immun. Eccl. c. Seculi princip. gloſs. upon the words ſatisfactionem nec poſſunt, what ſorts of ſatisfaction is required, and how, and in what caſes there is a different ſatisfaction required.*

Nor does this which has been ſaid, extend ſolely to ſuch Perſons as are Excommunicate (for their not appearing) at the inſtance of a party, *&c.* but even all others, howſoever Excommunicate, (either by the Arch-biſhop his meer Office, or the Arch-deacon, *&c.* in their Corrections) only the Arch-deacons, *&c.* muſt Certifie the Arch-biſhop that ſuch a Perſon was ſo Excommunicate by them, and have ſtood in that ſtate for the time aforeſaid: And upon this the Arch-biſhop makes his Letters ſignificatory, and all things are to be proceeded in as above, *mutatis mutandis*, of which Certificates Dr. *Cozens* (in his Apology for Eccleſiaſtical proceedings) ſpeaks more at large †.

† *Part. 1. c. 2. p. 9. Fitz. nat. brev. p. 64.*

SECT.

## SECT. 3.

### The manner of obtaining Abſolutions for all ſuch as are to be releaſed from the Sentence of Excommunication, and ſuch as are Impriſoned upon the aforeſaid Writ.

1. *What an Abſolution is, and the ſeveral ſorts of Abſolutions.*
2. *The Cauſes and reaſons which may be urged to the Judge in order to the obtaining an Abſolution.* — *Which may be theſe three:*
   1. *The Party's unwillingneſs to continue in that ſtate.*
   2. *The injuſtneſs of that Cauſe for which he is Excommunicate, as being ſuch, which the Eccleſiaſtical Judge holds no cognizance of,* &c.
   3. *The injuſtneſs of Excommunication, Scil. a falſe Certificate,* &c. — *In this caſe we muſt enquire:* *Whether the Plaintiffe can proceed, notwithſtanding the Defendant's objection.*
3. *The manner of obtaining the Abſolution, with the Letters ſignificatory in order to it, on behalf of ſuch as are Impriſoned.*
4. *What is required of thoſe who are to be Abſolved.*

ABſolutions being ſuch neceſſary conſequences to Excommunications, it ſeems not improper to make this diſcourſe concerning them, the concluſive part of this Chapter: an Abſolution therefore ſeems to be no other, than a releaſing or freeing any one from that penalty, which the Law has inflicted. Theſe obſolutions are of ſeveral ſorts, according to the different circumſtances, or ſtate of the matter; ſome are made *ad cautelam*, or *in diem*, (as falls out in cauſes of appeal ſometimes) others are abſolute: ſome are made in *Articulo mortis*, others *poſt mortem*, &c.

2. The

2. The Cauſes and Reaſons which may be urged to the Judge, in order to the obtaining of them may be many: as particularly: *Firſt*, The parties unwillingneſs to continue in that ſtate. *Secondly*, The injuſtneſs of the Cauſe for which he is Excommunicate, as being ſuch which the Eccleſiaſtical Judge holds no cognizance of; and in this caſe, if any man is Impriſoned by the Writ *de Excommunicato capiendo* (for not appearing to proſecute ſuch a Cauſe before the Eccleſiaſtical Judge) the Sheriff (having a Precept to that purpoſe) may ſet the impriſoned Party at liberty, without having any reſpect to the proceedings of the Eccleſiaſtical Judge, touching the cauſe of Excommunication *. But the ſecular Judge or Sheriff ought to be truly ſatisfied of this †, or elſe their Officers incur the penalty of the Provincial Conſtitution, if they acquit any Excommunicate Perſon out of Priſon, before he has ſatisfied the Law, *&c.* A third Cauſe or Motive to be urg'd, in order to the obtaining the Letters of Abſolution, may be the illegality of the Excommunication (*Scil.*) the Certificate being falſe, *&c.* In this caſe, the Perſon ſo injuſtly Excommunicate may appear perſonally, or by his Proctor (who muſt exhibit his Proxy) and alleadge that the Certificate formerly brought in upon the Execution of the Citation (taken forth againſt the Client) is feigned and falſe, and drawn contrary to the truth, eſpecially in as much as the Mandatory named therein, never Executed the ſame, or eſpecially, not in that day, or in that place ſpecified in the Certificate; and that it is impoſſible he ſhould be ſo Cited, in as much as his ſaid Client was abſent from that Pariſh at that time, *&c.* or he may alleadge the abſence of the Mandatory from the place, and at that time which he makes mention of in his Certificate; or any other Cauſes * in order to the diſproving the Certificate, (to wit) that the Mandrtory Cited another Perſon, and not the Perſon named in the Mandate, and that the Mandatory Executed the Mandate only at one certain time, and never elſe (for a negative conjoined with an affirmative Allegation admits as eaſie proof, as if it were an abſolute affirmative) and ſo in this caſe, having proved himſelf preſent in ſuch a place, at ſuch a time, he muſt neceſſarily be abſent

* *Lind. T. de immun. Eccl. c. Seculi princip. Sect. Suggeſto. Sect. ac quandoque gloſs. upon the word adhibetur.*

† *Ubi s. Sect. contra & de Sent. excom. c. præterea per totum.*

* *Vide Alciat. Prax. ubi diverſæ Cauſæ objici poſſ. ratione Jud. Citationis loci temporis Citantis, &c. T. de Cit. Sect. quæ poſſunt.*

ſent from all other places at the ſame time: [ *nihil enim abeſſe, & adeſſe dicitur, uno & eodem inſtante.* ] And it might ſo fall out, that though the Mandatory at firſt, through miſtake Cited another perſon, yet he might afterward Cite The Defendants Allegation being admitted, and a Term being Aſſigned him to prove that his Allegation, he ought to take the Oath of obeying the Law, and ſtanding to the Mandates of the Church, and ought to depoſe into the Regiſters hands the Contumacy Fees; and if he proves what he ſo alleadgeth, not only theſe Contumacy Fees are to be reſtored him again, but the adverſe party is alſo to be condemned in thoſe charges he is put to, in order to prove ſuch his objection: But if on the contrary he fail in the proof of it, he (that is the Defendant) is not only to be condemned in ſuch charges, but thoſe Contumacy Fees which he ſo depoſited *apud acta*, are to be delivered to his Adverſary, and he is to be denounced *Excommunicate de novo*, unleſs he ſatisfie that for which he is Excommunicate. In this caſe the Judge ought not to abſolve the party objecting againſt the Certificate, abſolutely from the Sentence of Excommunication but only *ad cautelam*, or to a day which is given him to prove what he alleadges, (eſpecially if the Party be Excommunicate for not paying coſts, or that which the Sentence of the Judge has condemn'd him liable to) and it is to be obſerved, (though the Acts of Court do not alway make mention of it) that it is but prudence in the Proctor of the adverſe party (to avoid charges and further conteſt) either to confeſs what his Adverſary has alleadged touching the aforeſaid objections, (if they be true) or to diſſent and deny thoſe alleadgments, and proteſt againſt them, and deſire they may be rejected. A ſecond way of objecting againſt an injuſt Certificate is, as if any is Excommunicate upon a Certificate, making mention that the party was ſought at his dwelling houſe in ſuch a Pariſh, and becauſe he was abſent, or abſconded himſelf, that he was Cited by affixing the Judges Mandate upon the Doors of the ſaid Pariſh Church: If the Excommunicate Perſon alleadge and prove, that neither he nor his Family dwelt in that Pariſh, for at leaſt half a year before, nor ever heard ought of ſuch affixing

fixing the Citation, but that he and his Family, during all that time, dwelt in another Pariſh, he is to be Abſolved, and ought to have his charges as above. Likewiſe if a Citation *viis & modis*, were granted upon a Certificate of a Primary Citation, or any other original or Perſonal Decree, that ſuch an one was ſought at ſuch houſes in ſuch a Pariſh, which are neither the houſes nor the Pariſh where the Party to be Cited inhabits; and if upon this Citation, the Judge order a Citation or Decree, *viis & modis* againſt the Party ſo to be Cited, and the Party obtaining this Decree, take care that it be Executed by a publick Edict (although in the Pariſh Church where the Defendant inhabits) and then upon a Certificate made of ſuch Citation, the Party obtains an Excommunication againſt his Adverſary: In this caſe here is juſt cauſe and reaſon why the Judge ſhould abſolve the Party ſo Excommunicate above, if he comes before the Judge, and alleadgeth the nullity and injuſtneſs of the Excommunication, and makes it out like as before. Which if the Judge doth refuſe, here lies juſt cauſe of Appeal; and Mr. *Clarke* ſays he has got Sentence in this caſe before the Delegates. See more of this where we ſpeak of Appeals from grievances. Now let's conſider, whether or no the Plaintiff can proceed in a Cauſe, whilſt the Defendants Objection (againſt this injuſt and irregular Certificate, and the injuſt Excommunication) has dependance? it ſeems he may: for although the Defendant were Excommunicate (though never really Cited) if he appears perſonally or by his Proctor, and do object againſt the Certificate (as above) in order to obtain his Abſolution; yet whilſt the Term depends, which is aſſigned him to prove ſuch his Objection, the Proctor of the Plaintiff may (if he will) proceed in the principal Cauſe, in the preſence of the Defendants Proctor, and may give a Libel as at other times; the reaſon is, becauſe (by the moſt ancient Style of Courts, in order to avoid multiplicity of Suits) limited Proxies (that is, to ſuch a particular effect only) are not admitted: But every Proctor that appears ought to exhibit a general Proxy in all Cauſes that are moved, or intended to be moved; that ſo at one and the ſame time, they may proceed as well

as

as to the principal Cauſe, as alſo to the Objection made againſt the Certificate. But if the Defendant prove what he objects, he muſt have Charges as above, *& ſic è contra.*

3. The Proctor of the Excommunicate Perſon appearing, and having exhibited his Proxy for the Excommunicate Perſon, he ought to ſwear that he believes his Client will for the future obey the Law, and ſtand to the juſt and lawful Mandates of the Church. [I queſtion whether or no this ought not rather to be done by the parties themſelves, for the doing it by another ſeems to be no more than a bare ſuggeſtion; againſt which the Provincial Conſtitution has inſerted a Caution †.] And further, the Proctor deſiring his Clients Abſolution, ought really to pay to the Proctor of the adverſe Party, or to the Party himſelf (if he be preſent) or he ought to depoſite into the Regiſters hands the Contumacy * Fees (as they call them) as they are taxed by the Judge. Which being done, the Judge abſolveth the Excommunicate Perſon, and reſtores him to the Society of other faithful Chriſtians; and at the Proctors Petition, orders that Letters of *ſignificavit* be made to the Kings Majeſty, in order to the freeing the Body of the Excommunicate Perſon out of Priſon, and this Writ for his Liberty is to be granted and directed in the ſame manner, as the other Writ was obtained and directed for the carrying the Excommunicate Perſon to Priſon. But it is to be noted, that when the Plaintiffs Proctor is not preſent to exhibit a Bill of Contumacy † Fees, and to deſire them to be taxed at the time of the Abſolution; the Defendants Proctor (who deſires the Abſolution) ought either to ſwear, or give bond to pay what other charges are expended, by reaſon of his Clients Contumacy, (beſides thoſe other expences which are aboveſaid to be taxed by the Judge, and depoſited into the Regiſters hands) and may be further taxed by the Judge; ſo that if the adverſe party is informed afterwards of more charges due to the Client, by reaſon of ſuch contempt, and if it appear to the Judge that there are more charges, by reaſon of ſuch contempt than thoſe formerly taxed, they ought to be allowed and placed to the firſt taxation,

† *In this I refer my ſelf to the experienced Practitioners, and to the Juſtices who are better able to explain the Provin. Conſt. Lind. de Immun. Eccl. c. Sec. Principes. Sect. Suggeſto. uſque ad finem cap.*

* *Lind. ubi ſ. gloſſ. ſuper verbo poſſunt. Sect. Si vero aliquis ſit excommunicatus pro contu. T. de don. gloſſ. ſuper verb. Abſol. Sect. Sed nunq.*

† *De hiſce expenſis plenius à Lanfr. in prax. not. de exp. n. 22. 23. ad finem. Alciat. de expenſ fol. 192.*

taxation, and the adverſe party ought to be compelled to the payment of them, notwithſtanding the former taxation. The reaſon of this, is becauſe the Contumacy Fees are not certain, ſo that the party to be Abſolved knows not what to depoſite, neither knows the Judge what to tax; for though it be certain, that the Excommunicate Perſon ought to pay Twopence for every Mile that his habitation is diſtant from the place of Judgment, or the Court he was to appear in; yet it is uncertain what charge the Plaintiff may have been at in obtaining Writs in order for his Apprehenſion, before he could take the Excommunicate Perſon, and other charges relating thereto: For theſe charges are all of them ſaid to be Contumacy Fees, and by that name, are all of them to be placed and taxed.

4. And this laſt (*Scil.*) the Oath *de parendo Juri*, &c. and the payment of charges for Contumacy and the like is required of every Excommunicate Perſon, and it is the ſole thing required of ſuch as are only contumacious for not appearing *. But there are other things more required of Excommunicate Perſons to be Abſolved (in ſome caſes) which they muſt likewiſe perform before they have their Abſolution. As if any is Excommunicate for not paying charges of Suit, or the *ſortem principalem* (that is, the thing they are adjudged liable to by the Judges Sentence, whether it be Legacies, Tithes, though perhaps wrongfully adjudged) they are not to be abſolved, until they depoſite into the Court the thing ſo adjudged; which (ſo ſoon as they prove is injuſtly adjudged) is to be redelivered them again: In like manner, if the Excommunicate Perſon alleadge the payment of this *ſortis principalis*, or matter adjudged, he is to be abſolved. The reaſon is, becauſe being admoniſhed firſt to pay the ſame ſuch a day, and being Cited to appear on another day, to ſhew cauſe why he may not be Excommunicated for not paying the ſame: He ought to appear on that ſame day, and alleadge the payment of it, and ſo purge his Contumacy, leaſt Letters of Excommunication be taken out againſt him, being it may not be known that he has ſatisfied the Premiſes. Yet notwithſtanding he be ſo Excommunicate, yet,

* *Lind. ubi s. gloſſ. upon the word poſſint.*

yet, if he comes (and depoſites the Summ or matter adjudged as before) and proves, that he has already paid the ſame Summ adjudged, according to the Tenor of the Sentence, the ſaid Summ is not only to be redelivered him, and he to be Abſolved from the injuſt Excommunication; but he muſt likewiſe have all ſuch charges allowed him, as he is put to in the proving this his Alleadgment.

## CHAP. IV.

### SECT. 1.

### The manner of the Defendants appearing by his Proctor.

1. *The Proctors Petition on behalf of his Client the Defendant, with the manner of exhibiting his Proxy.*

HAving now ſuppoſed the Defendant capacitated to appear, and all Objections removed, and all defects ſupplied on his behalf; we come now to ſhew his manner of appearing, and then proceed to ſhew what Letts, or hindrances may fall out on the Plaintiffs behalf; and how they muſt be redreſſed, ſo as both parties may be capacitated to ſtand in Judgment. Therefore the Defendants Proctor muſt exhibit his Proxy, and deſire a Libel, or elſe his Client to be diſmiſſed with charges. Then the Plaintiffs Proctor muſt either give the Libel into Court, or elſe muſt deſire a time, againſt which he may make a Libel ready, which the Judge agrees to, ordering a time according to the weightineſs of the matter. But before the Proctor of the Defendant ask a Libel, it is requiſite, that he conſider the ſtate and condition of the Plaintiff, at whoſe Suit his Client is convened; for if he chance to be ſuch, as has not the power *tentandi juris* (by reaſon of his Age,

or ſome other civil impediment *, as the following Chapter will manifeſt) the Defendant is not bound to ſtand convened at his Suit, until thoſe impediments be removed, though all agree, that all things whatever done by the Plaintiff in ſuch a ſtate, are valid enough until his ſtate be objected againſt; therefore it is neceſſary, that the Defendant do in the firſt place object againſt his adverſaries intereſt or condition, which is the thing falls next under our conſideration.

* *Naſcitur enim procuratoria exceptio ex perſona conſtituentis Myns. Inſt. de excep. Sect. n. 4. 5. Præterea.*

## CHAP. V.

### *The Condition of the Plaintiff conſidered.*

### SECT. 1.

### A Minor being Plaintiff.

1. *Minors are ſaid to be ſuch as have no power of appearing or ſtanding in Judgment.*
2. *The manner of aſſigning Curators to carry on the Suit on each Minors behalf; called* Curatores ad litem, *and this is done*
   1. *By the Judge himſelf.*
   2. *By ſome Commiſſioner appointed to that purpoſe by the Judge.*
   3. *By the Proctor conſtituted to that purpoſe by the Minor.*
3. *The form of drawing the Libel in this caſe, and entering the Court Act after the Curator is aſſigned.*
4. *How the Proctor who is aſſigned Curator is to be ſecured, if he be caſt in charges.*
5. *When and in what caſe, neither the Curator, nor the Legatory are to be condemned in Charges, and when they ought to be condemned in charges.*
6. *How an Executor is freed from a Legacy by paying it to the Curator.*

Minors

MInors are ſaid to be ſuch are not capacitated, by reaſon of their tender Age, to ſtand in Judgment. By this word is ſometimes meant one under ſeven (*a*) years of Age, ſometimes one under fourteen. (*b*) Sometimes this word is uſed to ſignify all perſons under twenty five years of Age; but by the Saxon Law, only thoſe under twenty one (*c*). Thoſe under fourteen by the Civil Law are called *Impuberes*: Thoſe under twenty one and above fourteen are called *Puberes*; and theſe are they who ſtand in need of Tutors, by whoſe means they may be capacitated to maintain and vindicate their own Right. Dr. *Zouch* expreſſeth himſelf (*d*) thus, concerning theſe ſorts of Plaintiffs, *nam ſicut Pupillus*, (I imagine he means one under fourteen years of Age) *Tutore aut ore agere & convenire poteſt*; *ita adultus* [ here he means one above fourteen and under twenty-one ] *Curatore conſentiente litem intendere & excipere debet.*

(a) *L. 4. de in jus voc. l. 28. ff. D D. de jur. de lib. C.*

(b) *Fort. de Inſt. de tut. c. præſentia Jur. Aver. præceſſ. p. 1. c. 7. obſ. 1. n. 1.*

(c) *Berſichim. t. d. tut. 6. n. 2. Carpz. pr. q. 82. n. 23.*

(d) *Elem. Jur. p. 5. Sect. 2.*

2. If a Legacy is left to one who is under ſeven years of Age, then the Father or next of Kindred to this Minor, ſhall go to the Judge, before whom he intends to promote the Cauſe for ſuch Legacy; and ſhall alleadge that ſuch an one Deceaſed, made his Will, wherein he conſtituted an Executor, and by that Will gave unto *B*—— his Son, a Minor, (that is, under ſeven years of Age) certain Legacies; and that by reaſon of his Non-age, the ſaid Minor is not in a capacity to Act, or ſtand in Judgment, in order to the recovering of this Legacy: Wherefore he muſt implore the Judge his Office in this behalf, and deſire that one or more Curators (*e*) may be aſſigned to the ſaid Minor, in order to manage the Suit againſt ſuch Executor, for the aforeſaid Legacy. Whereupon the Judge is wont to aſſign the ſaid Father or next of Kindred, and one or more of the Proctors of the Court (jointly and ſeverally) to be Curators *ad lites* (*f*) to the ſaid Minor, though their own ſpecial choice and requeſt at this Age is not required: But if the Minor is above ſeven years of Age, then he ought to appear perſonally before the Judge, and ought to alleadge and requeſt as above; or otherwiſe this Aſſignation of Curators avails not, but the

(e) *Specul. t. d. Synd. l. 1. par. 3.*

(f) *Mynſ. Inſt. T. de Cur. Sect. Item inviti. ff. t. d. Curat. l. 45. act. 1. de te jud. Mynſ. 1. obſ. 87. & 2. obſ. 31. 37. 38. Gail. 2. obſ. 95. n. 6. 107. n. 6. By what names they are called.*

Curator may be objected against, as not being a lawful Curator, or not lawfully appointed. Now these Curators are appointed; 1. Either by the Judge himself, as above; or, 2. By some Commissioner appointed for that purpose, as if a Minor above seven years of Age dwell remote from the Court he is Su'd in; so that not without great charges only, but also with the hazard of the Minors life, he cannot conveniently appear at the Court: In this case, the Judge (at the desire of the Father, or next of Kindred to the Minor, alleadging as above) is wont to grant a Commission to some persons constituted in Ecclesiastical Dignity, and to the next of Kindred to the Minor, with intent to save charges; or the Judge may grant his Authority to the Ordinary of the place where the Minor dwells, (unless he be far distant from the place of the Minors residence) to Assign Curators to this Minor; and the said Minor shall appear before these Commissaries or Commissary, and shall alleadge as before. Upon which Petition of the Minors, the Commissary must Assign him Curators in manner aforesaid; and then making Certificate of such Commission (taken out for this Assignation of Curators) to the Judge, who granted it. Then the Curator may take forth a Citation (by the name of Curator) against the Executor in a Cause of subtraction of Legacies, *&c.* 3. Some of our late Civilians are of Opinion, that a Minor above seven years of Age may constitute a special Proctor, to ask or request Curators to be Assigned to the Minor, and this Proxy and Assignation of a Curator at the Proctor his Petition or Election, they say, is valid in Law. Mr. *Clarke* says it was controverted in a certain Cause of considerable moment, whether or no this Proxy and constitution of a Curator by the Proctor, were valid in Law, whereupon it was adjudged valid, and is frequently practised in these cases; though formerly these Proxies, nor the Assignement of Curators by vertue thereof was of no use *, nor admitted practicable.

**Ratio est quia olim tenebant minor non potuit constituere procuratorem. Alciat. pr. fol 52. Sect. quando contra procuratorem opponatur ratione constituentis.*

3. And now this sort of Plaintiff being fitted to wage Law; you must consider the manner and form used in drawing his Libel or Declaration, whose *exordium* or preamble must contain these words, *Pars probi viri N. Curatoris*

*ris ad Lites M. minoris legitime Aſſignati* (that is) the party of the honeſt man *N.* (for ſuch are all men preſumed to be) Curator, Aſſigned lawfully to manage the Suit on behalf of *M.* a Minor, ſaith, alleadgeth, and in theſe Writings propoundeth *&c.* and ſo on as in all other Libells. And then after the common and uſual Articles inſerted in the Libel, in Cauſes of Legacies, this particular and ſpecial Article is to be inſerted (*viz.*) that the ſaid *N.* was, and is Curator *ad lites* to the ſaid *M.* lawfully Aſſigned and given, as appears by the Acts of Court, to which he refers himſelf to be particular in the Deſcription of ſuch things as are required in this Cauſe: You muſt obſerve that the name of the Curator, the name of the Minor, and the name of the Defendant muſt be inſerted (into the Act of Court I gueſs Mr. *Clarke* means). And here let the Curator take notice, that although (as is aboveſaid) the Aſſignment of Curators, was done by Commiſſaries remote from the place of Judgment, and that the Commiſſion or Authority by which they did it, were Certified to the Judge who granted it; yet becauſe this Commiſſion was brought in, and exhibited in the abſence of the Defendant, he ought to take care that he exhibit it again, (as a ſupply or an aſſiſting proof to the contents of the Libel) as well in preſence of the Defendant, as alſo before the Cauſe be concluded.

4. Sometimes it happens, that where Cauſes of Legacy are inſtituted in the Curators name, Sentence is given againſt the Curator, eſpecially if the Executor alleadge and prove that the goods are inſufficient to pay the Legacies: In which caſe the Curator, (that is) the Proctor, and not the Pupil or Minor is to be condemned in charges. Therefore let the Proctor take care that he have ſufficient ſecurity to bear him harmleſs from theſe charges, leaſt he be condemned in them, and caſt in the Cauſe; for though the Judge (as is ſaid before) do Aſſign the Father or ſome near of Kindred to the Minor, to be Curators with ſome Proctor of his Court; yet all things are wont to be diſpatch'd and done in the name of the Proctor, and not the other Curator.

5. But if in caſe the Curator or Legatory prove, that the Deceaſed made a Will, in which is contained the Legacy they Sue for; and that the Executor thereof has proved the ſaid Will, but has not paid this Legacy, though demanded: And though the Executor (to avoid charges might be run, in being condemned to the payment of the ſaid Legacy, by the Sentence of the Judge) do (before the beginning of the Suit) alleadge that he has fully Adminiſtred all and ſingular the Deceaſed's Goods in paying his Debts, the Funeral expences, and other neceſſary charges; and thereupon does exhibit an account of ſuch his Adminiſtration, making thereby manifeſt, that the Deceaſed died ſo Indebted, as that there remained not Goods ſufficient to pay the Legacy demanded; yet if the Curator or Legatory upon this, (having inſpected this his account) do deſiſt from further Suit, and trouble of compelling the Defendant to prove and juſtify this account by Witneſſes; they are to be diſmiſt without paying charges, though this be the Style or Cuſtome of all Courts, yet ſee what the Law is in this caſe. But it is otherwiſe, if after the Defendant exhibits this account as before, and the Curator or Legatory (not being ſatisfied therewith) do compel him to juſtify the ſame by Witneſſes, which if he duly proves, then the Cuſtome of the Court requires, that the ſaid Curator or Legatory ſhould be condemned in charges, becauſe they might (upon inſpection into this Accompt) have been informed of the truth thereof, by asking the Creditors named therein; if not immediately, yet by taking a time to deliberate * and conſult the truth of the matter, which is often wont to be given to ſuch as ask it, and this is called *dilatatio deliberatoria.*

* *Alciat. prax. d. dila.*

6. The Executor paying a Legacy (which is due to a Minor) to his lawful Curator, is freed from paying it again to the Minor when he comes of full Age, though the Curator never pays it to his Minor, having ('tis likely) laid the ſame out for him. The reaſon why the Executor receives ſo good a diſcharge is, becauſe he did it by the Judge his Order and Decree, that is, becauſe the Judge appointed this Curator to Act and Recover the ſaid Legacy: The Judge therefore ought to be very cautious whom he

he appoints to be Curator; but the Executor, (who is to pay this Legacy) that he might put the matter out of diſpute, (*viz.*) whether the Minor may recover the Legacy of him, yea, or no, after he comes at Age, notwithſtanding he has paid it to his Curator) it is not at all convenient for him to pay this Legacy, until the ſaid Curator do commence a Suit againſt him for it, as Curator to the Minor; which Action being inſtituted and begun, it is requiſite that the Executor appear to Action, and offer the Legacy in Court, and leave it *apud Acta Judicis* (that is, the Court Acts acknowledge and charge the Judge and the Regiſter with the Receipt of it, which Acts the Executor ought to look to, and ought to take a Copy of) and then the Executor is releaſed, and the Judge is charged with it. In this caſe the Judge ought not to deliver the ſaid Legacy (ſo depoſited) into the Curators hands, for the Minors uſe, unleſs ſufficient Bond be firſt entred for to bear the Judge and the Executor harmleſs from the ſame, and alſo for the due payment of it to the Minor when he comes at Age. I might here have proceeded in ſuch method, as to have told you the difference betwixt theſe Curators *ad lites*, and others enumerated by *Juſtinian*, his *Inſtitutes*, the *Codices*, the *Digeſts* and the *Gloſſaries*, &c. but this would appear too great a digreſſion, and be very little uſeful in this place. For your better information therefore in theſe differences, and their ſeveral Offices, I refer you to the Authors themſelves. *

* *Mynſ. Inſt. T. de Curat. Weſemb. in ff. T. d. Tutelis l. 26. n. 9. Curator teſtamenta non datur ibidem. Alciat. pr. f. 63. Sect. quibus dentur.*

## SECT. 2.

### The Plaintiff being ſuch as cannot give ſecurity to proſecute the Suit, and pay the charge if he be caſt.

1. *Who this is whom the Law terms ſuch,* ſ. pauper.
2. *The manner of admittance* in forma pauperis, *and the Oath the adverſary may enjoin him who is ſo admitted.*
3. *The manner of Aſſigning Advocates and Proctors to one ſo admitted.*

4. *The manner of alleadging and proving the ſufficiency of the Goods, ſo as to hinder this admiſſion.*
5. *The manner of proving the contrary in order to this admiſſion.*

THis State and Condition (*Scil.* labouring under a mean and indigent Eſtate) may be incident to either of the Parties in Suit, and the Premiſes may be equally objected againſt the Defendant, as well as the Plaintiff: In this place we chiefly reſpect the State of the Plaintiff, who being ſuch as cannot ('tis likely) give ſecurity to pay the charges of Suit *, if he be caſt, he is called *pauper*, a poor or indigent perſon; nor is the Defendant bound to conteſt Suit with ſuch an one, until he know how he ſhall be ſecured of his charges †.

* *Alciat. prax. fol.* 40. *Specul. in C. de lit. conteſt.*

† *Zouch. Elementa Jurisprud p.* 5. *Sect.* 8.

2. Now either of the Parties (as is ſaid) may be admitted *in forma pauperis*, at any time during the dependance of the Suit; theſe things being obſerved, and the Oath following being Adminiſtred (*Scil.*) that *N.* did appear perſonally, and in order to the revocation of his Proxy) that he alleadged himſelf not worth five pounds debtleſs Goods, and that (upon this) he offered himſelf ready to take his Oath, and deſired to be admitted *in forma pauperis*; which Oath being Adminiſtred, they are thence admitted by the Judge. Now if the Adverſary deſire it, the Party ſo admitted is obliged to take his Oath that he will pay the charges (and the *ſors principalis* *, that is, the thing adjudged by the Sentence, if it be Tithes, Legacies, *&c.* that are Sued for, and if it be the Defendant that takes this Oath) if he be caſt in the Suit, when he comes to a more plentiful fortune or condition. But this admiſſion does not extend to thoſe charges which are paſt, but only thoſe which are to come, and to be expended in the Suit: Likewiſe if the adverſe party will (before the ſaid Oath be taken) offer and alleadge himſelf ready to prove that the Party ſo alleadging poverty, is worth above five pound in his own proper debtleſs Goods: He is not to be admitted, unleſs the Party alleadging this ſufficiency of the Goods, do make default in the Proof of it. In the inferiour Courts, to wit, in the Conſiſtory of *London*, and the

* *Zouch ubi s. Sect. Areo. Alciat. ubi s.*

*Alciat. ubi s. f.* 120. *Sect. d. fatis dation.*

the Courts of the Arch-deacons of *London*, *Middleſex* and *Surry*, which are kept in *London* or its *Suburbs*, the party deſiring ſo to be admitted, muſt ſwear, that he is not worth forty ſhillings debtleſs Goods.

3. If any one being ſo admitted *in forma pauperis*, do deſire to have an Advocate and a Proctor aſſigned him, the Judge is wont immediately to aſſign them who ought to give their Council freely without any hope of receiving Fees: The Aſſignation likewiſe ought to be, if the other Party has feed Advocates and Proctors (and thoſe the moſt skilful and prudent) in ſuch a number, as that there are none, or at leaſt very few left to manage the Cauſe, on the part of him ſo admitted; therefore the Judge (at the Petition of the Party alleadging, and adding that he is like to looſe his Cauſe for the want of Advocates and Proctors) will Aſſign to the ſaid Party ſo alleadging, one or other of the Advocates, and one of the Proctors, (ſo Feed by the other Party as before) to whom he ſhall immediately give Fees (if he Sues not *in forma pauperis*). Likewiſe if the Plaintiff be one of the Nobility, or ſome Eminent Perſon, ſometimes the Advocates or Proctors refuſe to perform their Office againſt ſuch Perſons: In this caſe (this being alleadged, and Oath being made by the Party that he ſolicited ſuch Advocates and Proctors, and offered them their Fees, and that they refuſed to take their Fees, and to give Council) the Judge at the Parties Petition may Aſſign theſe Advocates and Proctors, and admoniſh and compel them (under penalty of ſuſpenſion from their Office) that they be in Council with the party, who muſt alſo immediately give them their Fees. But in the aforeſaid caſes, it is lawful for any to have two Proctors and three Advocates; and for a Noble-man and a Biſhop to have ſix Advocates and three Proctors, by the Statutes and Stile of the Court of the Arches; by the which Statutes (unleſs where there is a manifeſt defect of other Advocates and Proctors) the Judge ought not to Aſſign any of that number (ſo Feed on behalf of the Noble-man, *&c.*) at leaſt if there remain three or four expert and learned Advocates and Proctors (for the party who makes this Petition) to Fee. And obſerve further, that though the

Party

Party who Feed ſo many Advocates and Proctors (as above) do get the Victory; yet the Judge when he taxeth the Bill of charges, is not wont to allow Fees for all, but only for two or three Advocates at the moſt, and ſo many Proctors; becauſe ſometimes the parties in conteſt, if they were permitted, would retain a multitude of Advocates and Proctors, on purpoſe that the Adverſary might be charged with infinite expences.

4. The Party alleadging the Goods to be ſufficient (as was aforeſaid) ought to ſpecify the ſaid general Allegation on this manner. Alſo that *N.* had at ſuch time as this Suit was begun, and hath, and poſſeſſeth at preſent (unleſs he made ſome fraudulent alienation of his Goods, *&c.* ſince the Suit begun) in Houſhold Goods and other Furniture, and neceſſaries beſides Clothes, to the value of ten, eight, ſix or five pounds, and in other Goods, (*viz.*) Leaſes, Chattels *&c.* to the value as above; or in immoveable Goods, to the value of five, four, three, two or one pound of Engliſh Mony, yearly (for Lands to the value of twenty ſhillings *per annum*, is better worth than five pound) and the party objecting this, may ſpecify any other Goods, and then alleadge that he is commonly taken and reputed for a rich man among his neighbours, and thoſe who know him; however that he is accounted worth twenty, fifteen or five pounds at leaſt in his own proper Goods. And this Allegation touching the ſufficiency of his Goods, being admitted and proved, then the Party ſo deſiring to be admitted *in forma pauperis*, is to be rejected and condemned in charges, which are made in and about this motion and proof. And it is to be obſerved that a Clergy-man (who is beneficed) having a Living of the yearly value of five pounds, is not to be admitted *in forma pauperis*, unleſs he prove very great indigence and want. This Alleadgment now mention'd, may be urged by either party, (againſt his Adverſary, deſiring ſo to be admitted) by way of exceptions.

5. Now if the party deſiring thus to be admitted *in forma pauperis*, making reply to the Allegation of his Adverſary, do alleadge and prove by Witneſſes, that he goes back in the World, and that if his Debts were paid, (which

are

are conſiderable) he were not worth five pound, he may be admitted *in forma pauperis*, and muſt have his charges allowed, which are paſt or already expended. But he muſt take the Oath (as above) that he will pay the charges taxed, and to be taxed, and the *ſors principalis* (if he be the Defendant) when he acquires a more plentiful Eſtate: But yet this party ſo to be admitted *in forma pauperis*, ought not to have thoſe charges * he has been at, by reaſon of his Adverſaries delaying the Proceedings about the diſproving ſuch poverty; becauſe, if his Adverſary proved him worth the Summ of five pounds in Goods or Land (as above,) and that he was commonly accounted a man better worth than ſuch a Summ in the eſtimation of all men, it may be preſumed very probable that the party (ſo oppoſing this admiſſion *in forma pauperis*) might be ignorant what Debts the other might owe: Therefore he who alleadgeth this poverty, ought to alleadge his Debts particularly (*viz.*) what they are, and to whom he owes them, that ſo it may appear whether the Debts exceed or fall ſhort of the value of the Goods. To this Replication may alſo be added another Plea called *duplicatio* by the other party, (if need require) and ſo to a four-fold Plea, of which more particularly afterward. Now theſe Exceptions and Replications being thus given, the Judge ought to Aſſign the Parties a Term to hear his Interlocutory Sentence † upon theſe Exceptions, Replications, *&c.* which being determined; then the Defendant is compelled to conteſt Suit, ſo as it alſo do *conſtare*, that his Adverſary has, *perſona ſtandi in Judicio.*

* *See Mr. Clark his Practice tit. de modo probandi inſufficientiam bonorum, explain his contradiction.*

† *Alciat. prax. f. 101. de Off. Gud. in ard. Sect. Decimo.*

SECT.

## SECT. 3.

### An Excommunicate Perſon being Plaintiff.

1. *The manner of objecting and proving the Plaintiff Excommunicate, ſo as nothing be decreed at his Petition.*
2. *Matters acted and managed by an Excommunicate Perſon before this his Condition is objected, are valid in Law.*

AN Excommunicate Perſon is another ſort of Perſon, whom the Law allows not the liberty of ſtanding in Judgment: If therefore the Defendant do object that the Plaintiff is an Excommunicate Perſon, and that he has not *perſonam ſtandi in Judicio*; nothing ought to be decreed at his Petition *: Whereupon the Excommunication is to be proved by Exhibiting the Letters of Excommunication under the Judge his Seal forthwith, or at leaſt it is to be proved within eight days after ſuch objection, and this is uſually practiſed; and this Excommunication being proved, the Proceedings are to be ſtopt, ſo as nothing further be done at the inſtance of this Excommunicate Perſon, until this objection be removed, *&c.*

* *Zouch. Jurisprud. p. 5. Sect. 2.*

2. But yet if the Plaintiff (ſo Excommunicate) have diſpatch'd many and ſundry Acts in the Cauſe, (*viz.* if he has given his Libel, made his Adverſary conteſt Suit, and alſo produced his Witneſſes) before the Defendant propoſed or objected this Excommunication, all things ſo done by the Plaintiff are valid, but things done after are null and void. But Mr. *Clark* ſays, he has heard it was otherwiſe with the Defendant; who (though he were Excommunicate) yet might he propound and prove any thing in order to his defence.

SECT.

## SECT. 4.

### An Out-Lawed Perſon being Plaintiff.

1. *What an Out-law'd perſon is, or who is ſaid to be ſuch.*
2. *The manner of ſtaying the Proceedings, if an Out-Lawed Perſon Sue for any thing.*

THe laſt ſort of Plaintiffs (who have not capacity to ſtand in Judgment) which we ſhall here take notice of, are thoſe, whom the Law terms *Banniti* or *Utlegati*, and theſe are ſuch as are declared *in Bannum, ſeu privationem*: For theſe not only ceaſe to be free-born *Engliſh*-men, and are conſequently deprived of all the priviledges they ought to poſſeſs, and challenge in a free ſtate by the Laws of the Land; but alſo all the Laws of Humanity, the Exerciſe of all Offices, their Goods, and all civil Commerce, which by the Law of Nations they ought otherwiſe to have: They are out of the Protection of the Law of the Land; they are accounted as Enemies to the State, Fugitives and Rebels, and ſuch whom none ought to receive into the City, Houſe, or feed at their Table (*a*).

(a) *Gail. 2. de pac. pub. c. 1. n. 20. & 5. ſeq.*

2. Now theſe are no more capable of ſtanding in Judgment than Excommunicate Perſons, neither ought any thing to be decreed or granted at their Petition (*b*). If therefore an Out-Law'd Perſon, or his Proctor make any Petition, the Proctor of the Adverſary ought to object, that nothing ought to be granted upon ſuch his Petition, in as much as he is Out-lawed: And that he may immediately prove it, he ought to exhibit and produce the Kings Writ, by which he was ſo Out-lawed; and thereupon the Judge does uſually Superſede further proceedings in the Cauſe, as well on the Plaintiffs as the Defendants part; for in this caſe the Defendant is not obliged to make further defence; neither does there need further proof herein than the Kings Writ, which is proof ſufficient of it ſelf. I might here inſert many more, who by the Civil Law, have not a capacity of ſtanding in Judgment; but I refer you

(b) *Zouch. Jurisprud. Sect. 2. p. 5. Sect. Ratione Delicti. Jacob. Blum. proc. Camer. T. 34. n. 198.*

* *Alciat. prax. fo.* 38. *usque ad fo.* 46. 77. *Mynſ. Inſt. d. excep. Sect. præterea.* ‡ *Mynſ. ibidem T.* 14. *Sect.* 7. *n.* 4, 5, 6. *ac per tot.*

you to my Authour * where you may find them at large. There may likewiſe exceptions ariſe in reſpect of the Perſon of the Plaintiffs Proctor, which are alſo at large recited by *Alciatus* in his *Praxis utriuſque Juris*; alſo in reſpect of the Action, *&c.*

## CHAP. VI.

### *Other Objections to be made againſt the Plantiff; in reſpect of,*

### SECT. 1.

### His not appearing to proſecute the cauſe on that day, againſt which the Defendant was Cited to Appear.

1. *The Petition of the Defendants Proctor in this caſe, and the order taken to compel him to appear and proſecute.*
2. *The manner of diſmiſſing the Defendant with charges, if the Plaintiff do not ſo appear.*
3. *The manner of obtaining a Monition for the payment of ſuch charges.*

HAving conſidered the State of the Plaintiff, and thoſe objections may ariſe in reſpect thereof: We come next to conſider thoſe objections which may ariſe in reſpect of accidents, as his not appearing to proſecute the Cauſe, *&c.* We have ſhewn at *Chap.* 4. the manner of the Defendant his appearing by his Proctor, on the day he was Cited to appear in: Wherefore neither the Plaintiff, nor his Proctor being preſent to give a Libel as is deſired, the Defendants Proctor muſt alleadge, that his Client was Cited to appear on that day; at that time, and in that place to anſwer *M.* in ſuch a Cauſe, and that the ſaid *M.* takes no care to proſecute this Cauſe; wherefore he muſt deſire

deſire that he may be compelled by a Summons, to proſecute this Cauſe againſt ſuch a day, under penalty of having the Defendant finally diſmiſſed with charges: Which the Judge accordingly orders, appointing a competent time for his appearance, according to the diſtance of his habitation from the place of Judgment.

2. If the Plaintiff appear not upon this Citation (being lawfully Executed and Certified, and he being three times called in Court) on that day in which he was Cited to appear and proſecute his Cauſe, nor does any way proſecute it, he is to be pronounced contumacious; and in penalty of ſuch his Contumacy, the Defendant is to be diſmiſſed with charges, which are to be taxed (without any Schedule) to the Summ of four Nobles, according to the ancient Stile of all the Courts of the Arch-biſhop of *Canterbury*, and a Monition is thereupon to be decreed for the payment of ſuch charges. [In the Courts of the Lord Arch-biſhop of *York*, theſe charges are ſeldome taxed to more than eight ſhillings, where the Plaintiff doth not proſecute, *&c.* as I find it in ſeveral Cauſes of that Court, and eſpecially *Ledgard* and *Richardſon* againſt *Caleb Stopard*, *Clark*, *Termino Michaelis*, 1665. Dr. *Burwell* ſitting as Judge.] Obſerve alſo that if the Proctor of the Defendant do not appear, nor make his Petition on the ſame day he was Cited to appear in as aforeſaid, yet ought the Plaintiff to be Cited to proſecute his Cauſe thereon *; yet the Defendant may appear upon any other day if he will, and may alleadge in general, that he was Cited to appear as above to anſwer, *&c.* whom (ſeeing he proſecutes not this his Cauſe) he may deſire, may be admoniſht to proſecute the ſame as above: Likewiſe if the Plaintiff do appear upon ſuch Citation. and do proſecute his Cauſe, then he ought to pay no charges, unleſs he be caſt in the Suit. Alſo obſerve, that in taxing of the charges for not proſecuting the Cauſe, there ought no Oath to be taken (upon the taxing them) that they are really diſburſt, *&c.* [But then Mr. *Clarke* adds in another place [*Titul. de diſmiſſione partis reæ cum expenſis ſi Actor non Libellaverit*] that [though this be commonly adjudged, the taxation of expences (without the parties Oath, or the Proctors Oath, that his Client

* *Alciat. f.* 100. *nullus compareñ. ſive reus ſive Actor recedat ſine licentia Judicis.*

Client has really disburſed the Summ taxed, or which he deſires may be taxed) to be null and void, and that if there be an Appeal moved thereupon, the Appellant will get the victory: [Yet in this taxation of expences for not Libelling, this Oath is not required:] Here he ſeems to make a thing practice and not a practice at one and the ſame time. However, from this confuſed order of Mr. *Clarke* his expreſſing himſelf, we may infer thus much, that theſe charges ought not to be taxed without the Oath, that the party has really disburſed *, or expended the ſaid Summ: And this (as I remember) I have heard has been practiced; but conſult the *Practicos Dogmaticos*.

* *In taxatione expenſarum tria debent concurrere.*
1. *Judex debet taxare eaſdem*
2. *Victor debet jurare ſe illas feciſſe.*
3. *Judex debet delato juramento ferre ſententiam ſuper eiſdem.*
*Lant. caput quoniam de expen. n. 7. Alciat. de expenſis. Sect. quando & qualiter exp. condemnatio ſit facienda.*

3. A Taxation being made of the aforeſaid charges, the Defendant may deſire the Plaintiff may be admoniſhed to pay the ſaid charges taxed, againſt ſome convenient day, or elſe that he appear on ſome Court day, after the day ſo appointed for the payment of the ſaid Summ, and ſee himſelf Excommunicate for ſuch his Non-payment; which Petition, the Judge does accordingly grant.

## SECT. 2.

### His not taking care to give in his Libel or Declaration, at the time which the Judge Aſſigned for that purpoſe.

1. *The Defendants Petition for a Libel.*
2. *What charge is due, if there be another time aſſigned for a Libel.*
3. *The manner of diſmiſſing the Defendant, if no Libel be given in according to that ſecond Aſſignation.*
4. *A Monition for charges as in the laſt Sect.*

IN the Fourth Chapter laſt foregoing, we ſhewed how the Defendants Proctor might deſire a Libel, or elſe his Client to be diſmiſt, which he muſt requeſt in like manner again, in that day which the Plaintiff had aſſigned for this purpoſe: At which time the Judge may of his meer fa-

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vour (or for ſome good Cauſe being alleadged) aſſign (without any juſt cauſe of grievance) another day to the Proctor of the Plaintiff, in which he may give in his Libel.

2. But in this caſe, the Plaintiff ought to pay the Defendant Twelvepence for retarding the proceedings of that day, the payment of this Twelvepence, was wont formerly (by the Stile of the Court) to be duly obſerved: But now for ſome years paſt it was wont not to be demanded by the Proctors; whence it happens, that many Proctors are careleſs to give in their Libels, and do ſometimes prolong the time from day to day, for three Court days at the leaſt, before they give in their Libel.

3. Now if no Libel be given in at the ſecond time appointed for this purpoſe; the Judge (at the Petition of the Defendants Proctor) ought to diſmiſs the Defendant with charges, which he ought to tax to Thirteen Shillings Fourpence, according to the Cuſtome of the Court, which Cuſtome is warrant ſufficient for the taxation of that Summ: Inſomuch that neither the Defendant nor his Proctor, are obliged to ſwear, whether the ſame were expended and diſburſed or not; and therefore in this caſe, the ſaid Summ is due, whether more or leſs was diſburſed and expended.

4. Upon this a Monition is to be Decreed, for the payment of the ſaid charge, in manner and form as in the foregoing Paragraph.

# CHAP. VII.

## *Of Exceptions.*

### SECT. 1.

1. *What they are.*
2. *How many sorts of exceptions.*
3. *In what part of the proceedings they may be urged.*
4. *The manner of the Defendants urging these exceptions.*

I Cannot much excuse this method from being preposterous, seeing what is before precautioned, touching the state of the Plaintiff, might properly be reduced under this same Title of Exceptions. This word Exception taken in general, does signify every Judicial Act or Defence, whether propounded by the Plaintiff or the Defendant: but taken more particularly, it does signify an excluding or delaying the Action (*a*) or intention.

(a) *Jac. Blum. proc. Cam. tit.* 69. *n.* 3. *Alciat. de excep. Mynſ. Inſt. de excep. in rub. n.* 8, 9, 10, 11, 12, 13. *Panorm. in rub. d. excep. Lanfr.* ibid.

2. Now there are many sorts of Exceptions (*b*); some are Peremptory (which are either simply such, or defensive) others are Dilatory, which defer the Cause, and these are also twofold, *Scil. Dilatoria Solutionis* (where perhaps the party alleadgeth the payment or satisfaction of what is Sued for) and *Declinatoria Judicii*, which are exceptions, in order to the declining the Cause. Now these arise from many Causes (*c*); as by reason of the Judge, (who may be excepted against by recusation (*d*), provocation, *&c.*) by reason of the Arbitrators (of whom in the following *Sect.*) by reason of the Plaintiff (of whom we spoke fully in the two foregoing Chapters) by reason of the Proctor, the Advo-

(b) *See Mynſ. T. d. excep. per tot. & præſertim. Sect. appellantur ff. l.* 3. *d. excep.*

(c) *Mynſ. ubi s. Sect. præterea ex perſona s. dilatoriæ exceptiones qualis ſunt procuratoriæ n.* 1. 2. *Inſt. & n.* 4. 5.

(d) *Manuale jur. verb. ſig. verb. exceptio.*

Advocate, the Libel, the Witneſſes, the Interrogatories publick Inſtruments, Poſitions, Sentence, *&c.* A third ſort of Exceptions are called *Mediæ* or mixt. A fourth ſort of Exceptions are called *Anomalæ* (*a*) or irregular, becauſe they follow not the form of any other Exceptions: Of this ſort, is an Exception againſt an Excommunication.

(a) *Rosbach. prax. civil. tit. 42. per tot.*

3. Theſe Exceptions may be urged, more properly in ſome part of the proceedings than in others. The peremptory Exceptions (which ſome call perpetual) may be urged or propounded in any part of the proceedings before it be concluded in the Cauſe (*b*). The Dilatory (which ſome divide into temporal, perſonal and real) ought to be propounded and urged before the Conteſtation of Suit, and theſe are they we have even now ſpoke of, touching the ſtate of the Plaintiff, which are called by *Mynſing. Procuratoriæ Exceptiones* (*c*). Of which, the recuſation of the Judge is another ſort: Yet if in caſe the party thus excepting, have not knowledge of theſe Dilatory Exceptions (*viz.* that his Adverſary was Excommunicate, or a Minor, *&c.*) until after the Suit be conteſted, then he may urge theſe Exceptions any time before it be concluded in the Cauſe, but none (*d*) after. The mixt Exceptions in reſpect of their circumſtances, may be reduced to the two former; therefore they may participate equally of their priviledges: For ſo I underſtand *Alciatus* in his *Juris utriuſque praxi Titul. de exceptionibus. Sect. Mediæ ſive mixtæ fol.* 118. The Anomalar Exceptions (which ſome divide into favorables and *odioſæ*) ſeem to me to be reducible to the former alſo, though they are ſaid (*ex ſingulari quodam Jure*) to be propounded and urged as well after, as before the Conteſtation of Suit (*e*). I do not intend in this place to ſpeak of theſe Exceptions particularly one by one, only I ſhall hint at them, as they fall within the order and method of Practice. Some have already been diſcours'd of, as they came in their order to be conſidered: Thoſe which fall next under our conſideration, are ſuch as ariſe in reſpect of the Judge. Wherefore the Defendant being ſatisfied; and having ſufficiently urged thoſe impediments (*f*) on behalf of his Adverſary, (*viz.*) the dependance of a Suit betwixt them in another Court about the ſame matter:

(b) *Lanfr. d. excep. n.* 3.

(c) *Mynſ. Inſt. d. excep. Sect. prætereà n.* 1. *à per tot.*

(d) *Mynſ. ib. n.* 5. *Weſemb. ff. t. h. n.* 16.

(e) *Rosbach. proc. tit.* 43.

(f) *Vide Alciat. prax. fo.* 38. *ad fo.* 45.

ter: The falſhood or illegality of his Proxy, and ſuch other things as were even now mentioned in this Sect.) It is requiſite that he conſider the ſtate and condition of the Judge, who is to judge betwixt them, (though this were more conveniently and orderly done, before he either except, or accept the Perſon of his Adverſary) *ut talis ſit, qui rectè interjudicet*: So that if need be, he may uſe theſe following exceptions of recuſation of the Judge, the incompetency or unfitneſs of the Court, *&c.* which he muſt do.

4. Under theſe following Proteſtations (*Scil.*) of not conſenting to the Judge of the Court, (as a competent Judge on his behalf) nor any way proroguing his Juriſdiction, further than he is bound by Law.

## SECT. 2.

## The manner of this Recuſation or Refuſing the Judge.

1. *What it is.*
2. *In what manner it is done, and when.*
3. *Another (but not a proper) ſort of Recuſation called Provocation * in which* } *Conſider*
   1. *What it is, and from whom, and to whom it is ſo provoked.*
   2. *The manner of expreſſing the Cauſes of it, with an intimation to the Judge from whom it is provoked.*
   3. *What the Judge (from whom &c.) muſt do, and how the Party provoking muſt prove this his Provocation.*

* *Grecè ſumpta ſignificat omnem app. tam Jud. quàm extrajud. ex* ϖρὸ *&* καλέω.

THis ſort of Exception by way of Recuſation, is a refuſing or declining of the Juriſdiction or Audience, either in reſpect of the Judge his inability (*a*), or for ſome cauſe of ſuſpicion; as where any is convened before a Judge whom he ſuſpects (*b*) or thinks is not a perſon indifferent in the matter.

2. The

(a) *Zouch. Jur. p. 5. Sect. 4. ff. d. jud. l. 12. Sect. 2.*

(b) *Spec. per tot. de recuſ. & verb. Proceter. Sect. ult. Emer. pr. li. 4. n. 55. Gail. l. 1. obſ. 33. Officialis Epiſcopi recuſatus cauſa ejuſdem non coram arbitris ſed coram Epiſc. c. 4. Sect. finem de Off. deleg. n. 6.*

2. The Defendant who intends thus to except, ought in the firſt place (before he conteſt Suit (*a*), or accept a Libel I think, nay before he admit or object againſt the perſon of his Adverſary, leaſt by admitting or accepting any one Act, he ſeem to approve his Juriſdiction) to draw his Recuſation into writing, ſpecifying the Cauſes of it (*viz.*) that the Judge is his Enemy, (the Cauſes of which enmity ought to be inſerted) or that he is nigh of kindred to his Adverſary (*b*), or that ſome Suits do depend betwixt him and the Judge (ſpecifying the ſaid Cauſes) and ſuch like (*c*) and in the concluſion of this matter of Recuſation, he ought to refer the Cauſes of ſuch Recuſation to Arbitrators (*d*); and then there ought immediately two or three (*e*) honeſt men to be named, on behalf of the party ſo refuſing; and the Judge likewiſe ought to name as many on his behalf, and theſe Arbitrators are made Judges, and ſhall Judge concerning theſe Cauſes of Recuſation (*f*); and if they determine that the Cauſes of this Recuſation are ſufficient; then the party ſo refuſing, ought to be diſmiſt from further obſerving the Judge ſo refuſed, or his Court: But if the Arbitrators determine the contrary, (*viz.*) that the Cauſes of this Recuſation or Refuſal are not ſufficient, or at leaſt not ſufficiently proved; then the Party ſo refuſing, is to be remitted to the Judge, who was thus refuſed. But enquire, who muſt be Judge (in this caſe) in the Cauſe inſtituted. Some ſay the Arbitrators * of this Recuſation; if ſo, then Quære by what Law they are made Judges, and whether the Judge thus refuſed, or ſome Superiour Judges ought to give them this authority of proceeding in the Cauſe, and determining it. But if the Judge, who is refuſed as above, does not likewiſe name Arbitrators on his part, ſo ſoon as (or at leaſt, before he make any proceedings in the Cauſe) the Defendant has given in his Recuſatory mat-

(a) *Mynſ. Inſt. d. excep. Sect. præterea n.* 2 *ſpec. ubi s. Sect.* 3.

(b) *Si ſit ultra tertium gradum non eſt juſta Cauſa ſuſpicion. Bouric. de Officio Advocati c.* 16. *p.* 46. *l.* 1.

(c) *Specul. d. recuſ. Sect.* 2. *Marant. Specul. per tot* 6. *d. app. n.* 27. *& deinceps.*

(d) *Hen. prax. f.* 33. *verb. Cauſa ſuſpicionis & f.* 38. *Alciat. prax. fol.* 117.

(e) *Quis debet eos eligere vide Lanfranc, de recuſ. n.* 11. 9.

(f) *Alciat. ubi s. Lanfr. d. recuſ. n.* 11. *& num.* 9. *Sect. ſupra dicta forma recuſandi Judicem ſuſpect. per tot.*

* *Alciat. de recuſ. fo.* 117. *Sect. Duo principales. Specul. de recuſ. Sect.* 5.

matter, and has named Arbitrators on his behalf, but does proceed in the Cauſe againſt the Defendant; all things ſo done by the Judge (*a*) are null, or at leaſt unjuſt; and the Party ſo refuſing the Judge, may appeal upon ſuch Actions or Matters ſo attempted (*b*) by the Judge refuſed, or he may complain of their nullity to a Superiour Judge, and he ſhall obtain the Victory in ſuch his Appeal or complaint; notwithſtanding that theſe things ſo attempted, (if they had been done before the Judge was ſo refuſed) might probably have been Juſt, and no more than what the Law might require.

(a) *Mynſ. quoniam cont.* 11. *de proba. n.* 58. & *ſequen. Emm. tit.* 4. *n.* 66. *Innocen. Abbas. de Jud. c. cum ſpeciali de appel. Alex. conſil.* 89. *vol.* 1. *cap. Tholos. deciſio* 479. *verb. late.*

3. There is another ſort of Recuſation (though not ſo properly and perfectly ſuch as the other) and this called Provocation, which ſome affirm to be an Æquipollent term with the word Appellation (*c*) or Appealing, though ſome ſay otherwiſe; (*Scil.*) that that is properly called Provocation, which is made out of Court (*d*), the Cauſe not being begun: In which caſe it differs both from an Appeal, and a Recuſation; as if any does ſuſpect ſome Judge (*Scil.* the Ordinary of the place where he lives) for ſome of the Cauſes mentioned in the foregoing number, or for any other Cauſes whereby he may juſtly fear the ſaid Judge doth intend to proceed againſt him, in ſome cauſe of Correction, or (if it be a Clergy-man) to put him to prove what Title he has to his benefice; or in any other Cauſe whatſoever, which may probably be moved againſt him, of the Judge his meer Office in this caſe, the Party having ſuch a ſuſpicion, may provoke from the Judge he ſo ſuſpects, to a Superiour Judge, and may immediately ſubmit and ſubject himſelf, his Name, Credit, and Goods, to the protection and ſafeguard of that Superiour Judge. Now if in caſe this provocation be made from any Biſhop, his Official, Vicar, General or Commiſſary, (within the Province of *Canterbury* only, ſure) the Arch-biſhop, or his Official of the Arches, or the Auditor of Cauſes, in the Court of Audience in *Canterbury*, is the Superiour Judge in this caſe. But if you have this cauſe of provocation given by any other Inferiour Judge, (*viz.* an Arch-deacon or his Official, then you may

(b) *Lancelot. de attentat. part.* 2. *c.* 6. *p.* 156. *Faran. conſil.* 17. *n.* 1.

(c) *Gail. l.* 1. *O.* 2. *n.* 4.

(d) *Panorm. c. cum ſit Rom.* 5. *n.* 21. *de app. Specul. de app. l.* 4. *Sect.* 2. *præcipuè n.* 4. 8. *Gail. l.* 1. *Obſ.* 120.

may provoke to the Dioceſan Biſhop, or his principal Official. You may if you will provoke immediately (as above) from any Arch-deacon, or his Official, to the Archbiſhop of *Canterbury*, or his aforeſaid Courts, omitting the *medius terminus*, (the Biſhop of the Dioceſe where the Party provoking lives, and his Official, *&c.*) for the Statutes of this Kingdom, ſet forth concerning the manner and form of Appeals (*a*), have no place in provocations (*b*), and if they have, yet the Prerogative of the Arch-biſhop of *Canterbury* is reſerved as in cauſes of Appeal (*c*). 2. Now like as in all Cauſes of Appeal from grievances, it is uſually held, that the grievances ought to be particularly declared; ſo likewiſe the Party provoking (*d*), ought to ſpecifie the Cauſes of ſuch his provocation, otherwiſe it avails nothing. The party ſo provoking ought likewiſe (before he is Cited to appear before the Ordinary of that place where he lives, either *ex officio*, or at the Inſtance of a Party) to intimate this his provocation, to the Judge from whom he ſo provokes, otherwiſe this Provocation will avail nothing; for if in caſe he be Cited firſt, then is it a Recuſation or a Refuſing (and not a Provocation) which ought to be done, as in the ſecond number of this *Sect.* But if after this Provocation is intimated, the Inferiour Judge from whom it is provoked, do make any proceedings againſt the Party ſo provoking, they are all null, or at leaſt unjuſt, (like as in the number foregoing, touching the Recuſation) and obſerve, that the Party provoking, may for his greater ſafety, or as a further Cautele, prevail with the Superiour Judge, to whom he ſo provokes, that he write back to the Inferiour Judge, to acquaint him that he hath admitted this his Provocation; and he may likewiſe requeſt the ſaid Judge, to whom he ſo provokes, to Decree a (*e*) Citation and an Inhibition, as in a Cauſe of Appeal. And though (as is ſaid above) it be lawful to provoke, from an Inferiour to a Superiour Judge; yet ſee whether or no in this following caſe, the Provocation be of any validity or not. (*Scil.*) If the Inferiour Judge (before this Provocation be interpoſed in manner aforeſaid) do Decree the Party provoking, to be Cited

(*a*) *Anno.* 24. *H.* 8. *c.* 12. *Reſtall. verb. Appeals to Rome.*

(*b*) *Panorm. d. c. Concil. Sect. d. ap. n.* 5. *& c. bonæ memor.* 51. *n.* 8.

(*c*) *D. Stat. Anno.* 24. *H.* 8. *c.* 12. *verb. ſic ſaving always the Prerog.*

(*d*) *Berlachim. Expert. verb. appellatio extra-judicialis verſic.* 4.

(*e*) *Haud juri conſentaneum nam in extra-judiciali appellatione nihil omnino decernend. Gail. l.* 1. *obſ.* 120. *n.* 5. *Emeric. tit.* 73. *n.* 9.

Cited to appear before him for any of the Cauſes aforeſaid, or do really Cite him by a publick Edict, before this his Provocation is admitted by the Superiour Judge, and intimated to the Inferiour Judge. 2. Becauſe in this caſe the Recuſation ſeems rather to have place, and not the Provocation. In this caſe (Mr. *Clarke* ſays he has known) that (if the Citation of the Inferiour Judge were Decreed in the abſence of the Party ſo provoking, and nothing were Executed perſonally upon him before ſuch his Provocation was given in before, and admitted by the Superiour Judge) the Provocation avails as much, as if no Citation had been Decreed, and although the Party provoking, were Cited to appear before the Judge, from whom he ſo provokes, before this Provocation were intimated to the ſaid Judge; yet the Provocation is valid, and the party provoking may appear on that day, in which he ought of right to have appeared upon the Citation, and may intimate the ſaid Provocation to the Judge from whom it is ſo provoked, who ought to ſuperſede all further proceeding in the Cauſe. 3, Upon this the Judge from whom it is ſo provoked, may (by himſelf or his Proctor) appear before the Judge to whom it is ſo provoked, and obtain a Decree to proſecute this Provocation, as in a Cauſe of Appeal: And if the Party ſo provoking, being lawfully Cited, appear not to proſecute this his Provocation, the Cauſe for which it was ſo provoked, is to be remitted as in a Cauſe of Appeal, for not proſecuting the Appeal; and the ſaid Judge from whom it was ſo provoked, may proceed againſt the party (ſo provoking) either of his meer Office, or at the promotion of ſome aſſigned for that purpoſe, or at the inſtance of any other perſon: But if the party ſo Cited, do proſecute this his Cauſe of Provocation, he muſt give a Libel, and have a time aſſigned to prove it, and if he do prove ſufficient Cauſe of ſuch his Provocation, (though probably not all that are ſpecified therein) the Judge ought to pronounce that he hath juſtly provoked, and that the Judge from whom he has ſo provoked, is no competent Judge (or rather no indifferent Judge) for him, and

that

that he ought not to be convened before him; and the ſaid Judge ought to be condemned in charges made on the part of the Party provoking, and that juſtly, in regard he could not but know the juſtneſs of theſe Cauſes of ſuch Provocation, as well by the tenor of the Provocation it ſelf, as the tenor of the Libel touching the ſame: notwithſtanding which, he yet ſtands in conteſt. But if the Party provoking, do fail in the proof of his Libel, the Judge from whom it was provoked, is to be abſolved or diſmiſt, and the party provoking, is to be remitted to his Court or Juriſdiction, and is to be condemned in the whole charge made on the part of the ſaid Judge, by reaſon of his injuſt and cauſleſs vexation or trouble.

I might next proceed in order to ſhew the manner and difference of Replications, being things ſo ſubſequent to exceptions. Let this only ſuffice to tell you, that Replication is no more than a ſpecies or kind of exception, to which every Plaintiff has recourſe (if need be) againſt thoſe unjuſt Exceptions his Adverſary urgeth, which is alſo oppoſed by Duplication, and that again by Triplication, *& ſic uſque ad quadruplicationem*, and all of them in the ſame order of the proceedings as the Exceptions, that is, if the Exceptions be before or after the Conteſtation of Suit, theſe muſt be ſo too. I refer the Reader to my Authors themſelves * to be fully ſatisfied of theſe things, and the order obſerved about them.

I ſhall now proceed to my propoſed method, which is to ſhew the order and manner of proceeding (in Cauſes Tried in theſe Courts) from the giving in of the Libel, even unto Sentence; and that firſt in Plenary Cauſes, and then in Summary Cauſes. Then I ſhall proceed to ſhew what particular proceedings are more eſpecially required in ſome Cauſes more than others, as in Cauſes of Appeal, Cauſes of Diffamation, *&c.* Wherefore having ſuppoſed all the Three Perſons *Judicium conſtituentes*, to be capacitated, ſo as to be termed *rectè ſtantes in Judicio*; it is now convenient that the Plaintiff ſhew forth

* *Mynſ. Inſt. d. excep. & Replica. in rub. & text. n. 2. ante litis cont. uler. duplicas non licet progredi ſed poſt uſque ad quadrup. Speculator. T. de replica. l. 2. Joannes Andr. & Batr. in c. extra de excep. Alciatus d. Replicatione fol. 119.*

forth his Action by a Libel, that ſo the Defendant may deliberate with himſelf, whether he will contend or ſubmit; that ſo by knowing his charge, he may know how to make Defence.

THE

# THE PRACTICE OF THE Eccleſiaſtical Courts.

## *THE THIRD PART.*

### CHAP. I.

*The manner of proceeding in Plenary Cauſes from the firſt bringing, or giving in of the LIBEL or Declaration; even until Sentence be given and Executed.*

#### SECT. 1.

#### Of a Libel.

1. *What a Libel is.*
2. *How given into Court, and how admitted by the Judge, and how the Defendant is admoniſh'd to anſwer.*

I Shall not here trouble you with the ſeveral Species of Libels, nor the diverſe Acceptations and Definitions of them, nor their ſtructure, *&c.* ſeeing I have intended a more particular diſcourſe to that purpoſe (*Deo favente*). A Libel therefore (in ſhort) is derived

derived *à Libro* from a Book, whence formerly a Paper was usually drawn (*a*); and in general it signifies all manner of writing: It is taken figuratively, as when the matter is put for the thing contained; but properly in this argument, a Libel is taken for a Writing which containeth the action (*b*).

(a) *Wesemb. ff. de edend. n.* 2,

(b) *Hostiens. in rubric. d. Libelli obla. Sect.* 1. *n.* 11. *Spec. de lib. cont. Sect.* 1. *Socin. eodem tit. in rub. Alciatus de libelli obla. fol.* 103.

2. On that day wherein the Libel is to be given into Court, the Plaintiffs Proctor ought to exhibit the same, and desire it may be admitted, and that the Defendant may be assigned to answer thereto; (at which time he ought also to give (*c*) a Copy of his Libel to the Defendants Proctor) whereupon the Judge admits the same, and repeats it *in vim positionum, &c.* and assigns the Defendant to answer to the same the Court day following, and this is called *dilatio deliberatoria* (*d*), being given the Defendant with intent, that he may consider whether he will submit or contend. Now it often falls out, that there is occasion for the amending or altering of the Libel, which is to be done sometime before, sometimes after the Suit is contested: Wherefore we will consider the respective cases in which, and when these are permitted, before we come to the principal part of the proceedings, which is the contesting of Suit.

(c) *Alciat. à Libelli ob. fo.* 102.

(d) *Alciat. ib. fo.* 133. & 111.

## SECT. 2.

### Of the amending and changing, or altering things contained in the Libel.

1. *What emendation, or amending of a Libel is.*
2. *When, in what cases, and how many ways it is permitted, or not permitted.*
3. *The manner of revoking or alleadging an error committed in the Libel, as to the Name or Sir-name of either of the parties,* &c.
4. *What mutation or altering a Libel is.*
5. *When and in what cases it is or is not permitted.*

6. *When*

6. *When and what charges the Party amending is liable to pay; alſo the Party not proving his contrary matter how liable to them.*
7. *When and what ſort of ſecurity is required of the Parties in Suit, and to what purpoſe, and whether only one or both of them.*

THis being a matter of ſuch conſiderable moment, and intricacy, and ſo little underſtood by our ignorant Proctors of this Age, I will therefore inſert ſo much out of *Mynſinger* * (touching this point) as will ſerve to make theſe dull Souls (nay thoſe who are altogether unacquainted with theſe proceedings) plainly to underſtand this matter. *Emendatio*, or the amending of a Libel, is no more than the taking away or removing the fault or error, the ſubſtance of the Libel remaining intire: So he who corrects or amends things ſuperfluous (by cutting them off) things Conciſe, or (not full enough by adding to them) things Imperfect, (by ſupplying what wants) things confuſed, (by diſtinguiſhing them) things obſcure, (by declaring them) he may be properly ſaid to amend.

* *Inſt. T. de Action. Sect. Si minus.*

2. Now when, and how this amendment is permitted, and when not, is the next thing to be enquired: It is generally permitted before the conteſting of Suit, but after the Suit is conteſted, it is only permitted in ſome particular Caſes. Firſt then, the Libel is amended, by declaring ſuch things as are obſcure, as when the Plaintiff his Libel is obſcure, incertain, general, confuſedly and prepoſterouſly drawn; in this caſe an Amendment or Declaration thereof is permitted, even until the Sentence, if the Defendant who is conven'd do not except † againſt its incertitude, obſcurity, *&c.* But if he except againſt it, then it is only permitted to be amended before the Suit be conteſted, and not after, and in that caſe, if it be not amended before, then are all the proceedings null, (by reaſon of ſuch obſcurity) and the Sentence is invalid. Whence *Speculator in tot. de lib. concep. Sect. ult. verſic. cautus*, does caution the Proctors that they do not deſire the obſcurity of the Libel to be declared, but only that they barely

† *Gail. obſ. 62. n. 11.*

barely object, that the Libel is obſcure and general, *&c.* which if the Plaintiff omit to amend, the Defendant may null the whole Proceſs. Secondly, The Libel is amended when any thing is added to it, and in this we muſt reſpect whether this addition be made in Actions which are general, univerſal or ſingular *. In univerſal Actions it is tolerated to add any thing to the Libel, even until the Sentence, *E. g.* where any one Sues *pro hæreditate*, or his inheritance (we may by this underſtand all thoſe who (having a right to the Adminiſtration) do Sue ſome temerary Adminiſtrators, who have got Goods of theirs into their hands, either by a falſe and illegal Power or otherwiſe, but I humbly ſubmit this diſtinction to the learned) if they do expreſs what things or Goods did abſolutely belong to the Eſtate they Sue for; yet are they not prohibited, when ever they pleaſe, (or find it out) to add what more comes to their knowledge: For ſeeing it is controverted in general, that ſuch an one has a right to ſuch an Eſtate (Inheritance or Adminiſtration) it ſeems to follow conſequently, that he has not only asked or requeſted that particular thing named in the Libel; but alſo what ever elſe might any way belong to that Eſtate he ſo Sued for. Therefore in this Caſe an amendment ought not to be denied. The ſame may be ſaid in general Actions, ſuch as a Tutor or Curatorſhip, that is, where the Pupil commenceth ſuch an Action againſt his Tutor or Curator, and expreſſeth in his Libel only ſome things which were ill managed, waſted or concealed by his Tutor or Curator; yet may he add ſeveral other things (until Sentence) as he finds them out, or that they come to his knowledge: But how the Libel may be amended in a ſingular Action, is our next enquiry. In this caſe we have a fourfold conſideration, for ſometime there is an amendment to be made touching the thing Sued for; ſometimes the amendment reſpects the Subſtantial matters of the Libel; very often it reſpects the principal qualities, and ſometimes the adventitious qualities. Firſt, If the amendment reſpect the thing Sued for or asked, (*Scil.*) becauſe there is more due perhaps by Law, than a Man doth Sue for; or name in his Libel at firſt; the which miſtake he would rectify

* *What theſe Actions are, Mynſing tells in the* 30. *Sect. of this ſame title de Action. at n.* 22.

rectify by adding more to it afterwards) this *Mynſinger* ſaith may be done both before and after the Suit is conteſted, even until Sentence, (and this he proves to be the Sence of *Juſtinian* his words, [*Si minus petitum ſit, quam deberetur, ſine* &c.] from the tenth number to the end of the ſixteenth of this ſame Paragraph, where he very elegantly confutes the Opinions of *Accurſius*, *Bartolius*, and others, who ſeem to put a different interpretation upon this Text. Secondly, If the Amendment have relation to the Subſtantial matters of the Libel, it may without any hindrance be done before the Suit be conteſted, but not afterward: And this Opinion is generally received, as well in a Criminal, as a Civil Cauſe. Now the Subſtanal parts of a Libel in a Criminal Cauſe, are ſaid to be theſe (*Scil.*) to name the Judge, to expreſs the Month and the place where the Crime was committed, *&c.* and ſeeing the Subſtance of the Libel conſiſts in theſe, therefore they cannot be amended after the Suit is conteſted, (at which time the *Judicium* is ſaid to be *Acceptum*) but the Defendant is to be releaſed from this Accuſation, *ipſo hoc poſtulante*, the Defendant urging this: Nay, the Judge may *ex Officio* reject the Libel, (which is ſo to be amended after the Suit is conteſted) though the Defendant urge it not; ſeeing that in Criminal Cauſes, if it be omitted to name the place and the time, the Libel is null *ipſo jure*. In a Civil Cauſe, the Subſtantial part of the Libel conſiſts in the Concluſion or Petition, ſeeing it is required that it flow rightly from the Premiſes, and that one propoſition do orderly cohere to another, as if any Sues me for Land, (and in the concluſion of his Libel, he adds this reaſon why he asks it) becauſe he is become one of *Ceſar*'s Houſhold. This concluſion is frivolous, and by this means the Libel would be void, whether the Defendant object againſt it or not, neither is any amendment of it permitted after the Suit is conteſted, ſo that thereby the whole Proceſs is voided; for the Libel ought to have ſome neceſſary or (at leaſt) preſumptive * concluſion. Thirdly, if the Amendment reſpect the principal qualities of the Libel, then is it only permitted, before the Suit be conteſted. *E. g.* If a Husband accuſe his Wife of having com-

* *Lanfranc. de petit. lib. n. 7.*

committed Adultery with *Titius*: This is the principal quality in reſpect of the Fact; wherefore if it ſhould be amended after the Suit is conteſted, by ſaying that the Adultery was committed with *Flaccus*, and ſo ſhould name another perſon; this Amendment would alter the Subſtance of the Fact, therefore it is not permitted. Fourthly, If the Amendment reſpect the adventitious qualities, it is permitted even until the Sentence. Theſe qualities are ſuch, as neither change nor vitiate the Libel, but are a kind of *Pleonaſm* as where a time, place, day, hour, or ſome other circumſtances of that nature are added, which are not neceſſary, *E. g.* I demand ten pounds of *Titius*, which I lent him about two years ago, in the Houſe of *Flaccus*: Now this is an adventitious quality, in making mention of the year and place; for it is ſufficient that it do *conſtare de mutuo*: And thus far of the Amendment of a Libel, by adding to it. The Third part of Amendment of a Libel, is by detracting or deducing ſomewhat from it; as where any Sum or quality is to be deducted from the Libel, as if the Plaintiff do at firſt demand ten pounds, and afterwards would only ask five; or if he ſay at firſt that the Party he Sues, poſſeſſeth ſo many Goods of his, but afterwards he would but lay claim to a part of them: In this caſe an Amendment is regularly granted, even until Sentence. But if the Party Suing do require Bond of his Adverſary, after the Suit is conteſted, and would then detract from the Libel: In this caſe he ſhall not eſcape the Penalty of the Law, ſeeing this ought to have been done before the Suit was conteſted. In like manner, if any would detract from the Subſtantials, or principal qualities, they ought to do it before the Suit is conteſted only, and not after; as if in Criminal Actions there is ſome defect, as to the Month or place; in Civil Actions, as to the ſubſtance of the Fact. Laſtly, Amendment of a Libel is permitted, when things ſuperfluous are cut off; and this is ſaid to be lawful even until Sentence. Thoſe things are ſaid to be ſuperfluous, which might be omitted in the Libel, without the leaſt injury, *E. g.* I lent *Titius* on the Calends of *December* a Silver Drinking Cup, when *Flaccus* and *Berta* contracted Matrimony, *&c.* this laſt is very ſuperfluous;

perfluous, being nothing at all to the purpoſe. Thus far of the amending of Libels; if after the amendment or altering of a Libel, the Defendant is not inſtructed how to anſwer, *indulgenda eſt ei nova dilatio*, he ought to have another or a longer time aſſigned him to deliberate whether he will anſwer negatively or ſubmit; but it is otherwiſe, if in caſe he know, or is informed before hand of the matter which is to be added: But this controverſie is beſt decided by Cuſtom, which is the chief Interpreter of the Law.

3. Now comes Mr. *Clarke* to ſhew the manner of rectifying this error or amendment. If (ſays he) an apparent error be made in the Cauſe, as to the Name, or Sir-name of either of the Parties; or an error be committed in any computation, by writing an Hundred where Twenty ought only to be writ: [This is the third ſort of amendment, which is made by detraction, even now mentioned by *Mynſinger*,] or if there is an error committed in the Name of a Church, which is in conteſt betwixt two Clergy-men, (either for the ſole right thereof, or only ſome particular Tithes belonging to it) or in any thing elſe, ſo (as is aforeſaid) that this error do appear manifeſt by the proceedings themſelves, and other things done in the Cauſe; then the Proctor may alledge, that by the miſtake of the Writer of that his Libel, Allegation or other matter given in on behalf of his Client, the name [*John*] or the word [*Rector*] (naming the word or Sentence in which the error is committed) is inſerted and writ in ſuch an Article, or Poſition of the ſaid Libel, Matter or Allegation, and in ſuch a Line of the ſame, (computing from the Head or Foot of the ſaid Allegation) whereas in very deed, this Word or Name [*Thomas*] or that or theſe words ought of right to have been inſerted; as is apparent by the proceedings themſelves, and the other Judicial Acts made in the Cauſe (to which he muſt refer himſelf.) Wherefore he muſt revoke and ſubduct this error, to all intents and purpoſes in the Law, and deſire that it may be accounted as revoked and ſubducted; and that inſtead of that word, or name [*John*] or of the ſaid words, *&c.* this word [*Thomas*] or this word [*Vicar*, &c.] may be

inſerted, to which the Judge condeſcends and orders ſo to be done. (An error of this nature ſeemeth to reſpect the principal qualities before ſpoke of by *Mynſinger* *.) Though this Decree of the Judge of revoking the Error, may and is wont to be interpoſed; yet the revocation or ſubducting of it by the Proctor alone is ſufficient, if the fault or error do appear by the proceedings, to have been the fault of the Writer: Thus far Mr. *Clarke*: Let's return again to *Mynſing*.

* *It doth alſo reſpect the firſt limitation to the ſecond Rule (touching the changing of a Libel) hereafter inſerted.*

4. We have now done with the amending of Libels; we now come to the other part of *Mynſinger* his purpoſe, (*Scil.*) the mutation or changing of Libels; *mutare Libellum*, to change the Libel, is to vary or alter the ſubſtance of it, and (by leaving the old Action) to propound a new one, or omitting what was before repeated, to requeſt ſomewhat elſe: To this the *J. C.* add the accumulating of Actions, which is nothing elſe but the conjoining two ſeveral Actions in the ſame Libel, againſt one and the ſame perſon.

5. Now when and in what Caſes this is permitted, is our next enquiry: In which there are two Rules to be obſerv'd. 1. Before the Suit is conteſted, mutation is regularly permitted; yet ſome Caſes are excepted, in which neither that nor amendment of the Libel is permitted. As Firſt, where any intend under colour of this, to revoke his or their confeſſion. Secondly, if he intends or ſtrives to take away the Right he even now Sues his Adverſary for. Thirdly, if a mutation or an amendment has once been made already, or that there wants proper ſeaſons for ſuch mutation to be made, or elſe that for ſome Cauſe the ſame falls not within the Power of the Judge to permit it: As where a Civil Action being omitted, the Party thus changing his Libel, doth intend a Criminal or Defamatory Action. Fourthly, if the following Action be loſt or taken away by Election; as becauſe the Actions could not once be admitted, or elſe becauſe they were contrary one to another. Fifthly, where any intends a mutation, purpoſely to deferr the former Action, or to renounce the ſole inſtance of that Cauſe; in theſe Caſes a mutation is not permitted. But if any intends abſolutely to remit both the

the Suit and the Action, then they are to be heard. A Sixth Caſe in which this changing of a Libel is not permitted, is in Criminal Cauſes; being forbid by the *Turpillian* Ordinance: As *Bartolus* treats in *L. quæſitum 5. F. ad Turpill. 2.* The other Rule is, That after the Suit is conteſted, a mutation or a changing of the Libel is not permitted, becauſe that whoſoever conteſts Suit, is tyed to that ſame inſtance by his own proper Contract; yet this Rule is not alway without exception. Firſt, becauſe there is ſometimes by way of miſtake, one thing asked inſtead of another, or for ſome other Cauſe, than of right it ought to be asked: For in this caſe it may be lawful (the error being proved) to change the Libel after the Suit is conteſted in the ſame inſtance. Secondly, The Rule takes no place, when the Suit is not deferred by ſuch mutation, but is only made in order to avoid a Penalty. Thirdly, The Rule takes no place, where the Parties do agree and conſent to ſuch mutation, for the Judge ought to confirm this their conſent: There are many other Caſes of the like nature, which the Interpreters examine in their proper places. *Mynſinger* comes next to ſpeak of this accumulating of Actions, which he ſays is regularly granted; for it ought not to be denied to any, to uſe all the Right they have on their parts, ſo as that they do it not out of fraud to the other party; and when theſe are permitted, or are not permitted, he ſhews from the thirty fourth number, unto the end of this ſame Sect.

6. Likewiſe at Numb. 27. *Mynſ.* ſays, that in all the Premiſes where the Plaintiff is permitted to amend or alter, he is bound to pay to the Defendant his Charges (which he calls *Indebitæ fatigationis*) for ſuch injuſt delay: And of this nature alſo ſeem to be thoſe Charges, which Mr. *Clarke* Treats of in his *Titul. de expenſis retardati proceſſus*, being due for all ſuch things or matters as are given in on either Party, to retard or delay the proceedings. For if the Plaintiff or Defendant do propound any Defenſive Matter, as Allegation, Exceptions or the like, and having them admitted, do obtain a Term Probatory, by which the Proceedings are retarded; (for this delay depending, the Adverſe Party can ask nothing in order to bring the

Cauſe to a Concluſion.) If the party propounding this Defenſive matter, do make default in the proof of it. The Term Probatory (aſſign'd for that purpoſe) being elapſed, the Adverſe Party may alledge that *N.* has made default in the proof of the Allegation given in by him on ſuch a day, and that the Proceedings are retarded, referring himſelf to the Acts of Court, and deſire the ſaid Party to be Condemned in Expences for ſo retarding the Proceedings, *&c.* And if this ſo appear to the Judge, he ought to Condemn the Party in Charges, as is requeſted; and a Schedule of thoſe Charges being given, he ought to Tax the ſame, and Decree a Monition for the payment of them as above, like as in other Charges of Suit: Oath being likewiſe made, (as before) that he neceſſarily expended theſe Charges on this occaſion. No doubt, but if this Petition touching the Charges for ſuch retarded Proceedings, were eagerly purſued in all Cauſes, Suits would be much ſhortned: For then the Parties in conteſt would not dare to give ſo many frivolous and dilatory Allegations to Protract Suits as now they do. And this we may underſtand to take place in all things ſpoken of before touching Exceptions, Replications, *&c.* when or in what part of the Suit ſoever they are given in.

7. Now in this part of the Suit it is, that the Parties if need require, do uſually inſiſt upon Security *: What this Security is, how defined, and how many ſorts of it, I refer the Reader to *Weſembecy*, *Alciat*, *Mynſing.* upon Inſtitutes. *T. de Satiſdation*, *Speculator*, *Bartolus*, and others, *T. eodem.* All of which agree, that not only one, but both the Parties ought to give Security: The Plaintiff † ought to give Security to the Defendant, that he will perſevere in his Proſecution of the Suit, (either by himſelf or his Proctor) even to the end of the ſame; and this he ought to do before he offer the Libel of his Action if the Defendant requeſt it, but not elſe (*a*): And this he is obliged to do, either with Bondſmen, *vel per Cautionem Juratoriam*, by his Oath (*b*), nor is it the Plaintiff alone, but alſo his Proctor muſt give Security if required (*c*). The Defendant ſo ſoon as he receives the Libel, ought to give Security, either by his made Promiſe, Bond or Oath, that he will abide

* *Zouch. Juriſprud. Elementa part.* 3. *Sect.* 8. *Sect. poſtquam partes in jud.*

† *Mynſ. Inſt. T. d. Satiſd. Sect. Sed hodie n.* 2. *Weſemb. in ff. tb. n.* 3. *Alciat. tb. Spec. Sect.* 1.

(a) *Weſemb. ibid. n.* 3.

(b) *Mynſ. ubi s. n.* 5. *Alciat. ib.*

(c) *Mynſ. ibid. Sect. ſi autem. Weſemb. ubi s. n.* 3.

abide in Judgment until the Suit be determin'd *. Alſo it often falls out, that in this part of the Suit, when the Cautions are entred on both parts, to the effect aforeſaid, the Defendant doth likewiſe intend ſome Action againſt the Plaintiff, by way of Reconvention, in which Caſe Petitions are mutually made on both parts †; of the which proceeding ſee *Alciat.*

* *Mynſ. ibid. Sect. Sed hodie n.* 1. *Weſemb. n.* 2. *Alciat ib. ff. qui ſatisd. coguntur.*

† *Alciat. de Reconven.*

## CHAP. II.

### *Of the* Conteſtatio Litis, *or the Conteſting of Suit.*

### SECT. 1.

1. *What it is.*
2. *When it ought to be done, and by whom.*
3. *How many fold this Conteſtation of Suit is.*
4. *The manner and form of Conteſting Suit, and by whom.*
5. *The manner of getting a Decree for the principal Party to anſwer to the Libel; by whom it is obtained.*
6. *The manner of obtaining a Term Probatory, and by whom.*
7. *What other things are to be done at the time the Suit is conteſted.*

WE have above in the firſt part of theſe Judiciary proceedings, as alſo in the firſt Chapter of this part, explained all ſuch things as are preparatory to Judgment. Wherefore we now come to the ſecond part * *in qua ipſa Judicia* (that is) wherein the principal Cauſes are Treated; and this is the Litis Conteſtation, or the Conteſting of Suit, which begins in the very *Exordium* of the Suit, and retains that name and order, even until the Sentence. Now this Conteſtation of Suit is defined the *Principium Formale* † the Fundamental Judicial Act, whereby the Judge begins to take cognizance

* *Alciat. d. lit. cont.*

† *Spec. de ſal. Sect. n.* 10. *& de ſent. Sect. juxta num.* 6. *Mynſ. Obſ.* 74. *Cent.* 3. *Obſ.* 26. *Cent.* 4.

of the Cauſe, being made by a narration of the principal buſineſs (on the Plaintiffs part) propounded in Law, and by a Contradiction (*a*), or an objective anſwer following it, on the part of the Defendant.

(*a*) *Cujacius obſerv. lib. 9. c. 21. Socin. caput unic. n. 7. de lit. cont. Chilia in prac. c. 60. art. 14. lib. 3.*

2. On that day which is Aſſigned the Defendant to anſwer to the Libel (*b*), the Plaintiff or his Proctor muſt, in preſence of the ſaid Defendant or his Proctor, requeſt an Anſwer to the ſaid Libel, according to the Judge his Aſſignation.

(*b*) *Alciat. de Lit. conteſt. fo. 127. Sect. omnibus his expeditis.*

3. Now this Conteſtation of Suit is many fold; therefore for the better Illuſtrating its ſeveral Diviſions, I ſhall add this following Analyſis (*c*).

(*c*) *I referr the Reader to the Manual of the Law. De verb. ſig. the word Lis, where he will find all thoſe diviſions explained.*

Conteſting of Suit is three-fold (to wit)

- Affirmative.
- Negative which is two-fold:
  - General to wit,
    - which is either made
      - In expreſs words or Tacitely.
    - Eventual,
    - Pure.
  - Special.
- *Quaſi conteſtata*, or in a manner conteſted by the doing ſome Act, which is as valid as an expreſs conteſting.
  - As where [ in Emergent Affairs, ( before the Suit is conteſted ) and in which it is not lawful to Conteſt Suit expreſly ] the Suit is in a manner Conteſted, and as it were contracted in Court, by the mere interrogation and anſwer betwixt the Parties. So likewiſe in caſes where the Conteſtation of Suit is not neceſſary, the Suit is ſaid to be in a manner Conteſted by the next Contradictory Act which concerns the merits of the Cauſe (*d*).

(*d*) *Rosbach. procur. Civ. t. 49. n. 17.*

There are alſo two other Diviſions, in reſpect of its Genus, or the Nature of it, being ſaid to be either Civil (*e*) or Criminal.

(*e*) *Cujac. obſ. lib. 9. c. 21.*

4. We have ſaid before, that this Suit may be Conteſted either Affirmatievly or Negatively, and this is to be done by the Defendant his Proctor, on that day which was Aſſigned him to anſwer *. Wherefore if the Defendant is not minded to Conteſt Suit Negatively, he may con-

* *Gail. obſ. 62. n. 12, 13. ob. 66. n. 2. Specul. tit. de Libelli concep. Sect. ult. verſ. Canus.*

confeſs the Libel and conteſt Suit (*a*) Affirmatively, and ſubmit himſelf to the Judge, and offer what Charges are to be Taxed; which often falls out in Cauſes of Defamation, and this is called a ſingle or ſimple Confeſſion. There is another ſort of Confeſſion, which is called a qualified Confeſſion (*b*), when the Defendant doth indeed confeſs the Fact, but yet adds ſome certain Qualities or Circumſtances of this Fact, which are ſilently paſt over by the Plaintiff: By reaſon of which omiſſion of the Circumſtances of the Fact, it may be ſaid to be different from the Fact propounded in the Libel; and ſo conſequently the Action inſtituted is fooliſh, *&c.* Hence, though the Defendant may not ſimply deny the Fact, yet he may do it indirectly, whilſt he ſhews the Fact, to be much otherwiſe than what is related by the Plaintiff. But if he intends to Conteſt Suit Negatively, he muſt proteſt againſt the generality, ineptitude, obſcurity (*c*), and undue ſpecification of the Libel, (to which his anſwer is required) and with an intent of anſwering to the ſame, muſt object that the matters ſpecified therein are not true, as they are there related (*d*); and therefore, that what is there requeſted, ought not to be granted, *Animo conteſtandi Litem negative.* Then the Plaintiff muſt alledge, that his Libel is in Articles; therefore he deſires the Judge may repeat it, in full force of the Poſitions and Articles, which the Judge does accordingly, and admits it with a *Salvo Jure Impertinentium, & non admittendorum*, &c.

(*a*) *Vmm. diſputatio* 13. *n.* 53. *Man. Jur. verb. Confeſſio.*

(*b*) *Jacob Blum. proc. Camer. t.* 69. *n.* 54. *& ſeqq.*

(*c*) *Formam habet à Jure ordinatam C. de lit. cont. Bart. & Bald. hic tit. n.* 4. *Socin. d. c. n.* 86. *Caſtrenſ. conſ.* 401. *n.* 2. *vol.* 1.

(*d*) *Narrata prout narrantur factum reſpic. & petita prout petuntur ad jus pertinent Weſemb. Cod. lib.* 3. *T. de lit. cont. Alciat. de lit. conteſt.*

5. Then the Libel being thus admitted, and the Suit conteſted, the Plaintiff muſt deſire that an anſwer may be given to the Poſitions of that his Libel, by the Defendant and his Proctor; whereupon the Defendants Proctor replies, that he does not believe the Poſitions to be true. Upon this the Plaintiff (proteſting that he thinks he may be better relieved by the anſwers of the principal Party (or the Defendant) than of his Proctor (*e*) who manageth the Cauſe) deſires that he may be decreed to be Cited, againſt ſome convenient day, (according to the diſtance of the Defendant his Habitation, from the place he is to appear at) to anſwer Perſonally to the Poſitions of the ſaid Libel, either before the Judge, or ſome Commiſſioners

(*e*) *Zouch. Elementa Jur. prud. part.* 3. *Sect.* 9. *Sect. nam cum difficilis.*

appointed in his ſtead. Now this Decree for the principal party to anſwer in every Cauſe, is wont to be requeſted, and asked by the Advocate * who is Feed in the Cauſe, though in the Acts of the Court, it is for the moſt part inſerted, that it is the Proctor who makes the Petition. And this was wont of old to be obſerved, that ſo it might appear to the Judge, what Advocate was Feed in the Cauſe, but this is now otherwiſe apparent, ſeeing no Libel ought to be admitted, unleſs it be ſubſcribed by an Advocate. But obſerve this, that in Cauſes of Defamation, the Judge is not wont to decree, that the principal Party be Cited to appear, until after the Depoſitions of the Witneſſes are publiſhed. But if it be decreed for the principal party before the publication of them, then this Clauſe is always added in the Acts, (*Scil.* ſo that this decree for the principal party, be not taken forth nor Executed before the Depoſitions of the Witneſſes be publiſhed) becauſe the Defendant is not bound to anſwer to any criminal Poſitions, except they be proved by the Witneſſes.

* *Alciat. de lit. conteſt. Sect. qualiter fiat litis conteſtatio n.* 2.

6. Then the Defendants Proctor may diſſent from the Premiſes, and (Mr. *Clarke* ſays he may: However 'tis certain the Plaintiffs Proctor) may requeſt a Term † to be Aſſigned to prove the Libel; whereupon the Judge Aſſigns him to prove it within three, four or more Court days, according to the * diſtance of the place where the Plaintiff lives as above, and according to the weightineſs of the Cauſe. Now the Defendant may diſſent from this, and if the term given for proof of the Libel be too long and incompetent, he may alledge it, and object againſt it: And as the Plaintiff (having too ſhort a term Aſſigned him by the Judge for the proof of his Libel, in reſpect of the weightineſs of his Cauſe) may appeal; ſo likewiſe if too long a term be Aſſigned for the proof of it, the Defendant may appeal, if he diſſents from ſuch Aſſignation, but not otherwiſe.

† *Zouch. ubi s. Sect. cum vero confeſſio adverſarii.*

* *Dilationes vero ſecundum locorum diſtantiam moderandæ ſunt. Zouch. ibidem & Sect. Et Judices Cod. de dila. c. quoniam Sect. quod ita.*

7. You have now had an exact account of this Conteſtation of Suit, before which, the *Judicium* is not ſaid to be *Acceptum*, or begun: The Effects of which conteſting of Suit are many, (*Scil.*) the Proctor being made Lord of the Suit by it, and having power to ſubſtitute, which he had

had not before, and many other things *. Now before we conclude this Chapter, there are ſeveral other things to be conſidered, which ought to be done at ſuch time as the Suit is Conteſted, (in Form as before) and thoſe are the manner of requeſting the Proctors anſwer in writing to the Libel: The manner of Adminiſtring the Oath of Calumnyer. The manner of getting the Citation, which was decreed, *pro parte principali, &c.* and of theſe in ſeveral §§. in their orders.

* *De quibus vide Alciat. d. lit. conteſt. Sect. quis ſit lit. conteſt. effect. Socin. n. 8. ut lite non cont. Mynſ. obſ. 26. cent. 4. obſ. 74. cent. 3. Spec. de lit. conteſt. Sect. 1.*

## SECT. 2.

### The manner of requeſting the Proctors anſwer, with the Penalty to be inflicted on them, if they refuſe to anſwer or Conteſt Suit.

1. *The reaſon why the Proctors anſwer may be requeſted, and when it may be requeſted.*
2. *What remedy againſt the Proctor, who refuſeth to anſwer to a Libel, or Conteſt Suit.*

NOw 'tis probable, the Proctor of the Defendant (being one who is Sued in a Cauſe of Reſtitution of the Yoke of Wedlock, or of the late Divorce, or in a Cauſe of Separation, *à mensâ & thoro*, from Bed and Board) is ſo inſtructed by his Client, that he will confeſs the Solemnization of the Marriage alledged: In which caſe the Proctor of the Woman who Sueth, may immediately ask Charges of Suit, and Alimony to be decreed to his Client, whereas without the Proctors anſwer, he could not ask theſe until the principal Party were examined; whoſe anſwer is very often deferred in theſe caſes, through the Contumacy of the Defendant, who endeavour to avoid being condemned in them. Wherefore for this reaſon, the Proctor of the Plaintiff, after the Suit is Conteſted, (if he thinks that he can be relieved by the anſwer of the adverſe Proctor, upon any material poſition of the Libel, and

and especially upon any position of a Matrimonial Libel) he may at the first, (before it be decreed for the principal Party (or the Defendant) swear on his Clients behalf, that he believes the Contents of his Libel are faithfully propounded, and thereupon he may desire that the Proctor of the adverse Party may be admonished to swear to make a faithful answer to the positions of the said Libel, against the next Court day, which is accordingly decreed.

2. Now if in case the Proctor being thus Assigned to answer the Libel, do refuse or delay the doing of it, or if he refuse to contest Suit, (on this day wherein it ought to be Contested) either Negatively or Affirmatively, he is to be admonished to answer instantly, and if then he answer not, he is to be Excommunicate, and not to be pronounced *pro confesso*, as one confessing *; for this Pronunciation takes not place, unless either the Party or the Proctor be sworn first to answer; it is so at least in Causes of Instance, though (says Mr. *Clarke*) I have known some, who were accused of Heresie, who refusing to answer to the Articles objected against them, were pronounced *pro confesso*. And observe further, that it must be proceeded against the Proctor, refusing to answer, *&c.* in like manner, as against the principal Party refusing, *&c.* of whom afterward.

**Quid requiritur ut quis pro confes. pronun. vide Lanfr. de respons. n. 2.*

## SECT. 3.

## Of the Oath of Calumny.

1. *What it is, and in what part of the proceedings Administred, and how many sorts of it.*
2. *To whom Administred, and the form of it.*
3. *The Penalty of those who refuse it.*

IN this part of the proceedings also, the Oath of Calumny is wont to be Administred (*Scil.*) immediately after the Suit is Contested; nay in any other part of the proceedings,

ceedings, if it be omitted then (*a*), and in ſome caſes before the Suit is Conteſted. Whence the word *Calumnia* ſeems to have its ἔτυμον, or true ſignification, *Weſembecy* ſhews at the firſt Number of the *Titul. de Jurejurando, propter Calumniam.* Now this Oath of Calumny is defined, that whereby the Parties in Suit, do proteſt their Conſcience in the proſecution of the Cauſe, (*Scil.*) that they do it not out of fraud (*b*) or vexation, *&c.* but out of a confidence they have of the juſtneſs of their Cauſe. And of this Oath of Calumny, there are two ſorts, (*Scil.*) the one General, (which is not taken oftner than once in the Cauſe, and that immediately after the Suit is Conteſted, or (if omitted then) in any part of the proceedings afterward) the other Special, which is likewiſe called the Oath of Malice, and may be Adminiſtred to either of the Parties, as often as the Judge ſeeth fit (*c*); in any part of the proceedings either before or after the Suit is Conteſted, and whether the general Oath be taken or not.

(a) *Weſemb. in C. de Jur. jurand. propter Calum. n.* 9. *Alciatus de Juramento Calum. Sect. quando Jur. Mynſ. Inſt. T. pœna temere litigan. text. nunc ad mon. n.* 8. 9. *& in rub. n.* 5.

(b) *Weſemb. & Alciat. ubi ſupra & Mynſ. ubi ſupra in rub. n.* 5. *& ſuper text. eod. n.* 82.

(c) *Mynſ. Inſt. T. pradict. Sect. eod. nunc admonendi n.* 10. 11. *Gail. 1. obſ.* 87. *Bachovius ad Tr. v. 1. Speculator. d. Jur. Calumn. Sect.* 1. *verſ. ſed pone. Weſemb. ubi ſ. n.* 4.

2. Theſe Oaths are to be Adminiſtred not only to one, but to both or either of the Parties (*d*): And theſe Oaths *Mynſinger* proves (from *Cicero* his Oration *pro Roſcio*) were uſually Adminiſtred to the Parties, before *Juſtinian* his time, there is only this difference betwixt them, that the one may be Adminiſtred at any time when there is occaſion, the other only once. As to their Form, Authours preſcribe one and the ſame in effect for both parties (*e*). The General Oath of Calumny is uſually Adminiſtred in this, or the like Form. (*Scil.*)

(d) *Mynſ. ibid. & Sect.* 1. *ſeq. verſ. Item Actoris n.* 7.

(e) *Vide form. Juramentor. hujuſmodi apud Rosbach. proceſs. c.* 50. *n.* 21. *Ordo Cameral, p.* 2. *c.* 65. 74. *Mynſ. ubi ſupr. Sect.* 1. *n.* 4. 8. *Alciat. ubi ſ. de Jur. Calum. f.* 130.

*You ſhall ſwear that you believe the Cauſe you move is juſt; that you will not deny any thing you believe is truth, when you are asked of it; that you will not (to your knowledge) uſe any falſe proof; that you will not out of fraud requeſt any delay, ſo as to protract the Suit: That you have not given or promiſed any thing, neither will give or promiſe any thing in order to obtain the victory, except to ſuch perſons, to whom the Laws and the Canons do permit.* So help *&c.*

Accor-

According to the Verſe thus,

*You this ſhall ſwear, That this your Suit doth ſeem,*
*Right, juſt to be; at leaſt in your eſteem.*
*That you (when askt) the truth will not deny:*
*Nor promiſe ought: Neither that knowingly*
*You any falſe Proofs will imploy,*
*Nor urge delays, the Cauſe to 'noy.*

3. Now if the Plaintiff refuſe this Oath of Calumny, *&c.* he is to deſiſt from further proſecution of his Action *. If the Defendant refuſe it, then he is to be condemned, as one confeſſing the Articles laid againſt him. If theſe Oaths were duly Adminiſtred, there would not be ſo many ſhameful delays in the Cauſes as there are, ſeeing nothing is more ordinary in theſe days, than for a Cauſe to depend (with the bare Aſſignation, to give in an anſwer, or to produce Witneſſes, or to propound all Acts, *&c.* or to hear Sentence and the like) for ſometimes three, four, five or ſix Court days; nay ſometimes for two or three Terms, putting it off with the ſame dependance, from one day to another, to the great prejudice of the Parties, who complain exceedingly of theſe abuſes, pretending (Juſtly) they never knew any end of their buſineſs, after it comes into theſe Courts: Who gains by this I wonder? 'Tis a ſhame ſo regular a Practice ſhould be abuſed by the Villany of a company of time-ſerving ignorant Fellows, as are now adays; the only men advanced to imployments.

* *Alciat. de Jur. Cal. Sect. de pœna nolentis. Mynſ. ubi s. tit. pœna temere litig. in text. n. 7.. Zouch Elem. Jur. pr. p. 5. s. 9. Sect. ita Imp. & Sect. ſi quis vero litigan.*

SECT.

## SECT. 4.

### The manner of getting the Citation under Seal, which was decreed againſt the Defendant, to make him to anſwer to the Libel.

1. *What this Citation is, and how, and why procured.*

2. *Before whom the Citation for this purpoſe is to appear (Scil.) whether the Judge himſelf or ſome Commiſſioners aſſigned for that purpoſe, if before Commiſſioners we muſt conſider,*
   1. *What a Commiſſion is.*
   2. *Why granted, and the manner and form of it, and at whoſe coſt obtained.*
   3. *In what Caſes this Commiſſion ought not to be granted.*
   4. *The Proctors are to be admoniſh'd to be preſent at the Execution of this Commiſſion.*

WE told you before, that upon the Decree for the principal Party to anſwer, a Citation to that purpoſe might be extracted: And this ſort of Citation is called a Special Citation *, being directed only to one particular Act of the Proceedings. Now the Plaintiff muſt take care, that ſo ſoon as is poſſible, after the Suit is Conteſted, he procure the anſwer of the adverſe party to the Poſitions of the Libel; that ſo his intention being perhaps founded, or granted by the anſwer of his Adverſary; he may proceed to a Concluſion, and to Sentence in the Cauſe, without producing Witneſſes, or if he be relieved by the anſwer, in ſome one or more of the Articles, then he need but produce Witneſſes upon the reſt, which are not confeſt, and ſo eaſe his Client from the trouble of proving thoſe which are confeſt: Wherefore the Plaintiff (in order hereunto) ought to get this Decree or Citation againſt the principal Party, paſſed

* *Weſemb. in Paratit. Cod. num. 5. littera B.*

passed under the Judge his Seal, and executed as speedily as is possible, and certified and brought into Court on the day he is to appear in as before.

2. This Citation or Decree for the Defendant to answer to the Libel, is either to make the Party appear at the ordinary and proper place of Judgment, there to be sworn, or else before Commissioners appointed by the Judge his authority to swear the said party, and take his answer. 1. A Commissioner or Commissary, is a word of a very large extent, signifying generally every one who receives a Mandate, to dispatch Affairs or Business *. 2. Now the Judge is wont to grant a Commission (to Parties, or Persons named to him) with intent to save charges, and lessen the expences (on the behalf of the Parties in Suit) to swear and examine the Defendant, or principal Party: Especially if the Defendant so to be sworn, do live in parts remote from the Court, or place of Judgment. And in this case, there is seldom a particular day appointed for the Party his appearance, or any certain place, but only in general, that he appear at any time before such a day, (which is to be appointed by the Judge, according to the distance of his habitation from the place he is to appear at) to give his answer *&c.* before the Commissioners appointed for this purpose. And at the same time wherein this Commission is obtained, to the effect aforesaid, the Judge is also wont to assign the Commissioners a day against which to transmit the Parties answer, and certifie what other Proceedings happen in and about the Premises; against which day so Assigned, or rather against the day following (for if the Defendant do appear in any part of the day, assigned for the transmitting of this answer as aforesaid, he cannot be said to be contumacious) the Plaintiff must take care, that the Certificate of the said Decree or Citation be continued, that so if the Defendant take not care to undergo his Examen, and transmit his answer against, then he may be decreed Excommunicate. Now if the Person give this answer, be a privileged Person, then the Commission is to be obtained at the mutual expences of the Parties (*Scil.*) the Plaintiff and the Defendant: But if the priviledged Person be the Plaintiff,

of

* *Ruland. de commiss. lib.* 1. *c.* 2. *n.* 7. *Gail.* 1. *obs.* 96. *n.* 2. *Jacob. Blum. proc. Camer. tit.* 73. *par.* 39.

or he who Sueth; then he is to bear the charge of this Commiſſion, and not the Defendant, who receives the benefit of it. [An Improbable conſequence methinks; for the reaſon of it lyes altogether hid from me; therefore I refer the Reader to Mr. *Clarke* his own words (in his *Titul. Cujus ſumptibus Commiſſio, pro parte principali ſit concedenda*) to make a better conſtruction of them.] But in theſe days, the Judge (without any Cauſe being alledged) is wont to grant a Commiſſion, to examine the principal Party, or the Defendant, (though no priviledged perſon) if he requeſt it: In which Caſe, the Party ſo deſiring the Commiſſion, is to bear the whole charge in and about it. 3. In Matrimonial Cauſes, the Judge is not wont to Decree any Commiſſion for the Examination of the Defendants, or principal Parties; but is wont to compel them to appear, and ſtand perſonally in Judgment, and undergo the Examen the Judge impoſeth upon them; and that in ſuch Caſes where the Law provideth it, they may be Sequeſtred, or ſeparated into ſome place apart, *&c.* 4. Likewiſe at the ſame time of obtaining this Commiſſion, the Proctors are both of them admoniſhed to be preſent before the Commiſſioners, at ſuch time and place as the Commiſſion is to be Executed at.

*Alciatus & Lanfranc. T. de poſitionibus*, Obſerve that Poſitions are wont to be propounded in their practice in this part of the proceedings, (that is) immediately after the Oath of Calumny: But this Practiſe ſeems to be Hyperbolical, as well as Obſolete. For whether you reſpect thoſe poſitions which are called Defenſive, Peremptory, Exceptive, Eliſive, Declaratory, Replicative, *&c.* you cannot but confeſs they ſeem to be included properly in theſe, when and in what part of the proceedings ſoever theſe are urged, as whenſoever we except, then may we be ſaid to propound Poſitions exceptive, *&c.* Now *Alciatus* intends them * as queſtions, particularizing, and ſpecifying the Contents of the Libel more expreſly: By reaſon whereof the Defendant (who would probably anſwer in ſuch general terms to the obſcure Libel, that he would not at all eaſe the Plaintiff from the proof of ought) is now in ſuch Labyrinths, as he muſt of neceſſity (if he do anſwer ſo many ſeveral

* *Alciat. d. Poſition. Sect. quid ſit. Fol.* 131.

ſeveral and particular queſtions) confeſs ſomething, whereby the Plaintiff may be eaſed in his proof; and in this reſpect, *Articulus & Poſitio*, ſeem to differ little, and therefore at this day they are * promiſcuouſly taken the one for the other, and good reaſon it ſhould: For if this be the intent of theſe Poſitions, there cannot be any thing more particular than a Libel in Articles. I confeſs my ſelf an abſolute ſtranger to this piece of Practiſe, not remembring that I ever obſerved any Poſitions of this nature, which *Alciatus* ſpeaks of: Only Poſitions additional I have known; but theſe ſeem to reſpect the amending, or mutation of the Libel, and therefore are ſuperfluous to be treated of apart: From that Act, or manner of Practice, this is but my weak ſence, and bare reflexions on them: I willingly ſubmit my ſelf to the *Juris Tyronibus*, to be better informed herein.

* *Jacob Styrer. proceſs. p. 1. c. 4. Obſ. 7. n. 2. & 3. Gail. 1. Obſ. 89. n. 3. Rosbach. proc. jur. tit. 51. n. 2. De verbor. ſig. verbum Articulus.*

## CAAP. III.

### *Of the Perſonal Anſwer of the Defendant.*

### SECT. 1.

1. *What an anſwer is.*
2. *How many ways an Anſwer may be underſtood and taken, and the reaſon of ſuch diverſity.*
3. *How the Citation or Decree, for the principal party muſt be brought into Court.*
4. *What remedy againſt the Party, if he does not appear upon that Citation.*

BEfore we ruſh into the Throng, it is very requiſite we trace the Subject matter of this Chapter from the beginning, and explain what it is firſt, and the ſeveral Orders and Structures of it. An Anſwer therefore (which is

is here meant of) is an aſſevering * of a Poſition, conſiſting of Affirmation, or Negation. Or an Anſwer is a Confeſſion, made (to the Poſitions or Articles of a Libel) by the words he doth, or doth not believe, † *&c.*

*Ummin. diſp. 15. n. 20.

†*Gail.* 1. *obſ.* 92. *Mynſ.* 5. *obſ.* 86. *Rosbach. proc.* 1 *civil. tit.* 52. *n.* 1.

2. Now theſe Anſwers may be diverſly made, and as diverſly conſtrued, (*Scil.*)

- Anſwers may be diverſly made, and as diverſly conſtrued
  - In reſpect of ſome
    - Categorical or ſimple Enunciation or Speech.
    - Hypothetical or compound Speech.
    - Modal Speech.
  - Quality by reaſon whereof they are either
    - Affirming or Denying
      - Finitely or
      - Infinitely.
    - True
      - Neceſſarily or
      - Contingently (*Scil.*) by Accident.
    - Falſe.
  - Æquipollent term.

For Example: A Categorical anſwer is ſaid to be that, in which the Subject, and the Predicate have their principal parts: So that to anſwer Categorically, is nothing elſe, than to anſwer after the ſame manner, as the queſtion was propounded: As ſuppoſe this were the Poſition or Article to be anſwered to (*Scil.*) I propound that *Titius* did freely ratify and confirm that Will, whereby he is prohibited from being Executor: To which Poſition, *Titius* gives this Categorical anſwer, either ſimply and abſolutely (I believe, or I do not believe that I confirmed that Will, *&c.*) or adding this quality, (I do not believe that I did it freely.) In this you ſee, the anſwer is made after the ſame manner, as the Poſition was propounded. But when *Titius* anſwereth thus to the Poſition, (*Scil.* if I did confirm that Will, I was ignorant that there was any law-

ful Prohibition contained therein; or if I did confirm it, then I was compelled to it, *&c.*) this ſort of anſwer is called an Hypothetical anſwer *. Likewiſe if *Titius* anſwers thus, ('tis poſſible I might confirm that Will, *&c.* or I was neceſſarily compelled ſo to confirm it,) this ſort of Speech is ſaid to be a Modal anſwer. Alſo anſwers may be finitely affirming, or infinitely denying, which happens no otherwiſe than by placing the note of Negation; and though this nicety is not alway worth the taking notice of, yet ſometimes it may ſo fall out, that the Party who gives the anſwer, may be in danger of being perjured, by the miſtake of thoſe who draw the anſwer, not obſerving to place the note of Negation aright, by means whereof they may at leaſt alter the intent of the Party who is to anſwer. As ſuppoſe a Poſition, or Article is put thus (*Scil.* That the Teſtator was in ſo good health of Body at the time of making the Will, that he was able to write over his Will himſelf, and Seal it, *&c.*) Now the Defendant being to anſwer to this Article Negatively, anſwereth thus, [ *Credo defunctum potuit non ſcribere teſtamentum*, &c. ] which is an Affirmative Speech inſtead of a Negative, and implies no more, than that the Deceaſed was able to let alone the Writing and Sealing of his Will; whereas the Party anſwering intended to deny abſolutely, that he had the leaſt ability to write his Will as is alledged; which had been ſo to be underſtood, had the Particle *Non*, been placed before *Potuit*, and what ill effect, a miſtake of this nature (either in the Perſonal Anſwer or the Proofs) would have, if committed, may appear to any. I know the Proctors will cavil at theſe Criticiſms; for ſay they, none are ſo dull, but may perceive a difference betwixt theſe ways and manners of Speech. I grant [ Sirs ] ye may perceive a difference: But I queſtion very much, whether or no you can give a reaſon for ſuch difference? what effect theſe niceties may have (in Law) upon any of theſe proceedings, I refer to the Judgment of the Learned: But that all Anſwers and Proofs do conſiſt of ſome of theſe, may not (I hope) be denied.

* *Manual. Jur. de verb. ſignif. vide verbum Reſponſio.*

3. The

3. The Decree or Citation for the principal Party to anſwer, is to be brought into Court (as other Citations are) on that day ordered for his appearance, with a Certificate Indorſed upon it, like as other Citations have.

4. And if the Party appear not, then the Proctor of the Plaintiff ought to accuſe his Contumacy, and deſire that he may be decreed Excommunicate in like manner, as is ſpoke at the beginning of the Treatiſe, in the Chapter of Excommunications, *&c.*

## SECT. 2.

## The manner of Producing, Swearing, and Examining the principal Party before the Judge.

1. *How the Defendant is produced.*
2. *How ſworn, and the proteſtation of his Proctor at the time of his being ſworn.*
3. *What penalty, if he undergoes not his Examination (after he is ſworn) within the time limited for that purpoſe.*

IF the principal Party, or the Defendant, be preſent in Court before the Judge; the Plaintiff is wont to acquaint the Judge to this purpoſe; (*Scil.*) that he there produceth the Defendant, whom he deſires may be ſworn to make a faithful anſwer to the Poſitions of the Libel given in on his part.

2. Then the Judge having ordered the Defendant to lay his hand upon the Book, adminiſtreth an Oath to this effect. *You ſhall ſwear that (having removed and laid aſide all manner of affection, which you any way bear to your own Cauſe) you will faithfully and truly anſwer to the Poſitions of the Libel, given into this Court againſt you, by ſuch an one, in ſuch a Cauſe; touching your knowledge in ſuch things, as concern your own proper Fact, and touching your credulity in ſuch things, as concern the Fact of ſome elſe: So help you God,* &c. Upon which the Defendant muſt Kiſs the Book, in Teſti-

mony that he Sweareth. Now the Defendants are ſometimes produced to anſwer to criminal and captious Poſitions, which he ought not by Law to anſwer to, as falls out in Cauſes of Defamation, Correction, Perjury, *&c.* Wherefore it is neceſſary in theſe and the like Caſes, that the Party, or his Proctor do (at the time this Oath is Adminiſtred) proteſt in the preſence of their Adverſary, or his Proctor; that they do not intend to anſwer to any criminal or captious Poſition: Or if it happen they are requeſted to anſwer to any ſuch Poſition, then this their anſwer to be accounted Null, and as though they had not been made. If this Proteſtation be omitted in theſe caſes, then the Party anſwering, loſeth the Benefit of the Law, which he might otherwiſe have.

3. This Oath being taken, the Plaintiff ought to requeſt the Judge to admoniſh the Party to undergo his Examination upon the Poſitions of this his Libel, againſt the next Court-day, or elſe that he appear then, and ſee himſelf Excommunicate, for that his Contumacy, in not being ſo examined: And if the Defendant being ſo admoniſhed, do not take care to be Examined againſt that day, nor doth appear then to alledge ſome reaſonable Cauſes, in order to excuſe ſuch his contempt; this his Contumacy is to be accuſed, and in penalty thereof, he is to be Excommunicated as above. And if he ſtands Excommunicate Forty days after the ſame is denounced, then this Denunciation is to be Certified, and he is to be Signified to the Kings Majeſty, and the Writ for taking his Body is to be obtained againſt him, and he to be kept in Priſon, until he be Examined, and ſatisfy the Church for this his contempt, and pay Contumacy Fees. But if the Party or his Proctor (on that day which was ſo Aſſigned for his appearance, to ſee himſelf Excommunicate for not being examined) do alledge ſufficient Cauſes why he was not examined; (*Scil.*) becauſe the Regiſter, when he requeſted him to Examin him, was not at leiſure, [they ſeldom draw the Anſwers, but the Proctors of the Defendants themſelves do it] or any other lawful Cauſe: Then the penalty of this his contempt, is reſerved until the next Court-day, or rather (ſeeing in that caſe he cannot be juſtly ſaid to be

contu-

contumacious) he is to be admoniſhed again as above, to undergo his Examination, if he be preſent in Court; and if not, then the Cauſe is to be continued in its former ſtate until the next Court-day: So that if the Defendant is not Examined before this Prorogation approach, he is then to be excommunicate.

## SECT. 3.

### The manner of producing the Defendant before Commiſſioners Aſſigned to take the Anſwer.

1. *The manner of preſenting the Commiſſion, and how accepted of by the Commiſſioners, and how Executed.*
2. *How the Execution of it is to be certified to the Judge who grants it.*
3. *The manner of alledging the contempt of the Commiſſioners in not tranſmitting the proceedings upon the Commiſſion.*

IN the laſt Paragraph of the foregoing Chapter, we ſhewed you that the Decree or Citation for the principal Party as aforeſaid, is to appear either before the Judge or Commiſſioners appointed for that purpoſe; before whom alſo the Proctors are admoniſhed to appear at the ſame time. Which Commiſſion is to be preſented to the Commiſſioners, and accepted of by them, in like manner as the Commiſſion for Examining Witneſſes, (of which in the following Chapter) is preſented and accepted. Upon which they are to proceed in all things, in the ſame manner as if the principal Party were produced before the Judge, (whereof we ſpoke in the foregoing *Sect.*) the like Oath being to be Adminiſtred, and the like Proteſtation being made by the Proctor as was there ſpoke of.

2. The Commiſſion being Executed, a Certificate is to be made thereof, after the ſame manner, as the Commiſſion for Examining the Witneſſes is to be Certified, *mutatis & mutandis*, of the which ſee in the following Chapter.

3. To the ſame place alſo we muſt refer you to inform your ſelves, the manner of alledging the Commiſſioners contempt, *&c.* and the way of proceeding againſt them for ſuch contempt, therefore repetition is needleſs.

## SECT. 4.

## The Defendant refuſing the Oath to anſwer to the Libel.

1. *What remedy in this Caſe.*

IF the Defendant refuſe to take the Oath, to anſwer to the Poſitions of the Libel, or to any other matter, to which he ought by Law to anſwer; or doth pretend any frivolous Cauſes why he ought not to take it; he is not to be pronounced *pro confeſſo*, as confeſſing the matter, though he have been often admoniſhed, and commanded to take the Oath, but he is to be denounced Excommunicate, and is thereupon to be Signified to the Kings Majeſty, and to be Impriſoned, and there detained, until he take the Oath.

## SECT. 5.

## The Defendant not anſwering fully to the Poſitions of the Libel.

1. *The Poſition of the Proctor of the Plaintiff.*
2. *What remedy againſt the Defendant in this Caſe.*

THe Defendant being ſworn, and having given his anſwer, but not a ſatisfactory one, the Proctor of the Plaintiff may alledge, that the Defendant hath not anſwered fully to ſuch a Poſition or Poſitions, referring himſelf to the anſwer, and to the ſaid Poſitions, as alſo to the Law in that caſe; wherefore he muſt deſire, that the Defendant

ſendant may be called againſt ſuch a day, to anſwer fully to the ſaid Poſitions.

2. Upon which the Judge [ informing himſelf in the matter, and being ſatisfied ( by comparing the anſwer, with the Libel there in Court ) that the Defendant has not fully anſwered ] may Decree the Defendant to be called, according as is deſired, or elſe he may aſſign to hear what the Defendant hath to ſay, in excuſe of his not anſwering fully againſt the next Court day; and then ( informations being had with Councel, as to the Law, and the matter of Fact in this Caſe ) the Judge may either grant, or reject the Petition made by the Plaintiff; and if he Decree that a fuller anſwer ought to be made, then a day is to be appointed for this purpoſe, and a Citation to be Decreed againſt him, to appear and ſee himſelf Excommunicate, if in caſe he anſwereth not againſt that day ſo appointed for a fuller anſwer: And if he do not anſwer fully before that day, nor appear on the day which was appointed for his appearance as aforeſaid, then he is to be Excommunicate; and if ( being ſo Cited ) he do appear, but alledgeth no ſufficient Cauſe why he did not anſwer, he is not to be ſworn to anſwer *De novo*, but is to be admoniſhed, and compelled to anſwer fully as above, ( by vertue of the Oath he has already taken ) before the next Court-day, upon pain of being declared *Pro confeſſo*, or one confeſſing the Articles or Libel laid againſt him; or elſe to appear againſt that time, and ſee himſelf declared and pronounced as ſuch: At which time if he appear, the Proctor of the Plaintiff is to requeſt, that he may be admoniſhed to give a full anſwer immediately, under penalty of being declared *Pro confeſſo* * as before, which being granted by the Judge, if the Party doth not then accordingly anſwer; The Judge ſaith on this manner ( *Scil.* ) *Becauſe* N. *being preſent in Court and being asked, commanded, and admoniſhed to give a full anſwer, hath refuſed ſo to do; therefore we pronounce him Contumacious, and in penalty of this his Contempt* ( *at the Petition of*

* *Quæ requiruntur ut quis pro confeſſo pronuncietur, vel non; vide Lanfranc. de Reſponſ. n.* 2. 16. *ac per tot. ubi plures ponuntur caſus in quibus non habeatur pro confeſſo, licet non reſpondet. Generaliter verò hæc Reg. procedit. Qui tacet non utique fatetur ſed tamen verum eſt eum non negare. Adde Alciatum de poſition. Sect. pœna non reſpond. fol.* 136.

M.) *we declare him* Pro confesso, *or as one confessing or granting those things, which he refuseth to answer fully to.* * But it is more safe, that the Judge do not pronounce him *Pro confesso* in such general terms, but rather more particularly, for not answering fully to such an Article, or such a part of an Article.

* *This is called a presumptive confession. vid. Manual. Jur. de verb. signif. verb. confessio.*

## SECT. 6.

### The Defendant or his Proctor Confessing or Answering too much to the Libel or other matter.

1. *The manner of the Defendants or his Proctors Petition, in order to the revoking this Confession, and when this Revocation is permitted.*
2. *The principal Party may be Convict of Perjury.*

IF the principal party do confess any thing in his personal answers through mistake,* he ought to appear personally before the Judge, and revoke this error; for the Proctor by a general Proxy, *ad lites*, hath no special Mandate to revoke this error; but the Defendant may grant a special Proxy (to his Proctor) to this purpose. Which said Party, or his Proctor, may appear before the Judge, (in the presence of the adverse Proctor) and declare, that they do then and there subduct and revoke their own Confession or Answer, made (on such a day) to such an Article of the Libel, or matter, *&c.* and that they do desire this their answer may be accounted as subducted and revoked to all intents and purposes in the Law. And then making the errour manifest, and that it is much different from the matter of truth, they must alledge that this their Confession or Answer escaped from them, through a manifest error, and that the truth of the matter is much otherwise. *E. g.* in the personal Answers aforesaid, it is answered, that he believed *M.* had been Farmer of the Rectory (where the Tithes Sued for were due) in the Years and Moneths mentioned in the Libel, or in such a Year: Whereas in very

* *An erroneous confession being made by the Proctor, or the principal Party himself, does prejudice the Party, unless the error be proved and revoked, which may be done at any time before Sentence. Alciat. de confessi. Sect. Quando & quæ confessio revocari possit. C. de confes. l. unica extra eodem c. 2. de hac materia etiam Lanfranc. plenius notat. de Confes. num. 3. 19. 21. 24. & præsertim in numero 33. sicut in c. Quoniam n. 18.*

very deed, he was not at that time Farmer of the ſaid Rectory, having Sold, or alienated all his Right, Title and Intereſt, in and to the Tithes aforeſaid, (upon ſuch a day, in ſuch a Moneth and Year, before the time mentioned in the Libel) to one *D*, by reaſon whereof the ſaid *D*, (and not *M* mentioned ſo by miſtake in the Anſwer) was the real Farmer of the ſaid Rectory, and all manner of Tithes whatſoever belonging to the ſame in thoſe years Libelled: Which thing being unknown to the Reſpondent at the time of giving his anſwer, therefore the ſaid Confeſſion was erroneous, and a perfect miſtake; or if in the perſonal Anſwer, there is a confeſſion of eight Acres of Barley, when in very deed there was but four, or perhaps no Barley at all. Now if this error be proved ſuch by ſufficient proofs, or by the confeſſion of the Adverſe Party; then the Defendant or his Proctor may revoke theſe erroneous Confeſſions by the Judge his Decree, and not otherwiſe, if the ſaid Anſwers were accepted of by the Adverſe Party before they were revok'd. But I think (ſaith Mr. *Clarke*) that even in this caſe where the Anſwers are accepted, this revocation avails, though the Judge do not interpoſe his Decree, becauſe ſeeing the matter and the truth is prov'd to be otherwiſe, the Adverſe Party cannot take any advantage by the ſaid erroneous confeſſion, though he has already accepted it, and this Revocation may be made any time before Sentence, ſaith *Alciatus*, in the place laſt Quoted.

2. That the Defendant may be Convict of Perjury, is not at all to be doubted; touching which matter mention is before made, where it is ſhewn what Cauſes the Eccleſiaſtical Courts take cognizance of; and for the better decerning how, and when any one may be underſtood to be perjured, we may not unfitly appropriate to this place what *Lanfranc* ſays, *de teſtibus* *, to which place I refer the Reader.

* *De Teſt. depoſition. n.* 74.

SECT.

## SECT. 7.

### Satisfaction being made as to the Anſwer of the Defendant; Letters Compulſaries are to be obtained to compel Witneſſes to come againſt the Term Probatory.

1. *What theſe Letters Compulſaries are, and why obtained.*
2. *When and how obtained.*
3. *Before whom theſe do compel the Witneſſes to appear.*

THE Defendant not confeſſing all, or none of the Intention of the Plaintiff; it ſtands him in hand, to produce Witneſſes to prove his Intention or Libel, either the whole, or that part thereof which is not confeſſed by the Defendant, in order whereunto he muſt get Letters Compulſaries decreed againſt the Witneſſes he thinks fit to name; and theſe are another ſort of Special Citations ſpoken of before *.

* *Weſemb. in Paratit. Cod. num. 5. lit. D. Scurſius. Conſ. 9. num. 3. Cent. 1.*

2. They are wont for the moſt part to be obtained when there is ſatisfaction given, as to the anſwer of the Defendant; though ſometimes they are obtained at the ſame time the Citation *pro parte* is granted, with a *Proviſo* that the Witneſſes be not produced before the Defendant has given his anſwer; and in like manner as the Plaintiff obtained the Citation, for the principal Party to give his anſwer; ſo muſt he obtain theſe Letters Compulſaries by alledging, that there are ſuch and ſuch Perſons, who are fit Witneſſes, *&c.* † whom he deſires may be compelled to come and give their Teſtimony, *&c.* whereupon the Judge grants his Petition.

† *Alciat. de teſt. fol. 148. Sect. qualiter ſint teſtes producendi.*

3. And theſe Compulſaries are likewiſe for the Witneſſes to appear, either before the Judge himſelf, or before Commiſſioners appointed by him for that purpoſe, (which Commiſſioners ought then to be named, and the Commiſſion likewiſe granted) before whom the Witneſſes muſt be examined ſome time within the Term Probatory, and at the

the time they are Cited, the Plaintiff ought to tender them, or at leaſt to promiſe them their Charges of Journy, *&c.* and this ought to be, whether they appear before the Judge, or before Commiſſioners, *&c.* the Proctors are alſo admoniſhed, (at the time, theſe Compulſaries are obtained) to be preſent at the Examination of the Witneſſes, (if they be to be Examined before Commiſſioners) in like manner as at the taking the Perſonal Anſwer.

## CHAP. IV.

*Of Proofs to be produced by the Plaintiff upon his Libel, or other Matter, on, or before the day Aſſigned for that purpoſe called in the Law, the* TERM-PROBATORY, *and of Exceptions againſt thoſe Proofs,* &c.

### SECT. 1.

1. *What this Term-Probatory is* *, *and to whom it appertains.*
2. *What Proofs are, and how many fold, and how they may be ſaid to differ,* &c. *and when produced.*

* *Probatio autem non eſt in tranſcurſu faciendâ, ſed citata diverſa parte ad ejus expeditionem, & termino juſto ad id præſtituto. Datur autem unus & idem terminus Actori & Reo* &c. *Weſemb. de prob. n.* 8. *in ff. Chilian. in pract. c.* 17. *& Weſemb. ubi ſ. T. de teſt. n.* 5. *lit. B. colum.* 2.

A Term-Probatory is ſaid to be that time or delay, which was given to the Plaintiff, wherein he might prove what he Pleads or Sueth for; nor has the Plaintiff the ſole and abſolute benefit of it: For the Defendant may likewiſe make uſe of this Term, if the Plaintiff renounceth it, as is ſhewn afterward.

2. A Proof in this ſenſe, is a making the matter evident to the Judge, ſo as he may be able to determine the controverſie impending; in a large ſenſe, it ſignifieth a ſetting forth the matter before the Judge: More ſtrictly it ſignifies

fies that full proof, which is made by Witneſſes and Inſtruments *. Now Proofs are ſaid to be two-fold, in reſpect of the matter in Controverſy; one ſort of Proof has relation to the matters of Fact, the other has relation to the matters of Law which occur therein; and this ſort of Proof laſt mentioned, ought to be made by the Laws, Cuſtoms, Canons, *&c.* ſometimes directly, ſometimes by arguments †.

*Maſcardus de Proba. volum. 1. 9. 4. & 3. Weſemb. in paratit. ff. de proba. & preſ. n. 2.*

† *Alciat de Proba. fol. 140 Baldus in additione a ſpeculatorem de teſtibus. Sect. nunc videndum.*

Proofs (*a*) which have relation to the matters of Fact, are ſaid to be either

- Moſt evident, which are ſuch Proofs as are made by Priviledges, Inſtruments of undoubted Credit, *&c.*
- Evident & clear, or full Proof, which makes ſo much Proof, as ſerves to determine the whole Suit; & this is done either by
  - Witneſſes.
  - Inſtruments, *i.e.* Writings.
  - Confeſſion.
  - Evidence of the Fact.
  - An Oath.
  - A juſt Preſumption.
  - Fame.
  - Undoubted Circumſtances.
- Leſs Evident (*b*) which make ſome Proof of the matter, but not ſo much as will ſerve to ground a Sentence upon; this is made by
  - One Witneſs.
  - A private Book or Writing.
  - A mean, or reaſonable, or indifferent preſumption.

(a) *De hiſce prob. apud Lind. videas t. de jure jur. c. Presbyteri. Sect. quod ſi verb. probationes.*

(b) *Maſcard. de prob. vol. 1. queſt. 4. n. 16. Ummius diſp. 15. th. 1. Alc. ub. s. & in tract. preſumption. in prin. par. 3. n. 2. Weſemb. in ff. de prob. & preſ. n. 4. ubi plene de his probation. diviſionibus reperias. Speculator tit. de prob. Sect. videndum.*

Likewiſe thoſe Proofs which are made by Witneſſes, may be ſaid to differ, in reſpect of the Form of Speech, in like manner, as the Anſwer of the Defendant, or principal part was ſaid to vary. And theſe Proofs are uſually produced after the Suit is Conteſted, and not before, (that is, at any time, before the Term Aſſigned for Proof called

[called the Term-Probatory] be expired.) *Alciatus* * recites ſeveral Caſes, in which the Proofs (the Witneſſes at leaſt) may be produced before the Suit is conteſted.

* *Ubi ſ. de Teſt. fol. 146. Weſemb. ff. ubi ſ. n. 9. & T. de teſtibus n. 3. litt. A.*

## SECT. 2.

### The manner of bringing in the Letters Compulſaries, againſt the Witneſſes.

1. *How brought into Court, and how a Citation* viis & modis, *is obtained upon the ſame, if the Witneſſes could not be found,* &c. *alſo the Term-Probatory to be Prorogued.*
2. *The manner of proceeding, if none of the Witneſſes Cited do appear.*
3. *Alſo if ſome of them appear, and the reſt abſcond.*

I Omitted in the laſt Paragraph of the foregoing Chapter, to acquaint you, the manner and way Mr. *Clarke* obſerves in requeſting the Witneſſes to come and depoſe their knowledge, *&c.* * againſt ſuch a day, within the Term-Probatory: Which day coming, and the Witneſſes not appearing, the Proctor of the Plaintiff muſt alledge to the Judge, that there were ſuch and ſuch Witneſſes, very neceſſary to prove the Contents of the Libel given in by him, which were deſired and requeſted to appear, *&c.* and that notwithſtanding their Journey, Charges were offered them, yet they have refuſed, or at leaſt deferred to come, or (if it be ſo) that they have promiſed to come, but come not: Whereupon, he muſt deſire they may be compelled to come and give their Teſtimony, *&c.* And he muſt alſo Swear to the truth of this his Allegation, that it is according to the Information given him, which he believes to be true (except the principal Party himſelf, or ſome other who did requeſt them, be preſent there in Court; for then they muſt Swear poſitively, and not *de credulitate*) that is, that the Witneſſes were requeſted as aforeſaid, and had their Charges tendred, and that this his Information he believes is true. Upon which Petition, the Judge decrees

* *Plurimi (inquit Lanf.) dicunt quod requiritur ut teſt. ſit citatus, aliter reddit ſe ſuſpectum, quæ opinio eſt omnino falſiſſima; imo ſi ſit tantum rogatus valet dictum ſuum de teſt. n. 9.*

crees them ſo to be Cited or compelled to appear [upon ſome day before the Term be elapſed] to the effect aforeſaid: Which Term-Probatory, if the Plaintiff fears will be almoſt elapſed before he gets theſe Compulſaries (ſo decreed) Executed, and Certified; it will be requiſite, that he do at the ſame time, deſire the ſaid Term to be Prorogued, or Prolonged to ſome farther day; and this is the Citation or Compulſary, we are to preſume and ſuppoſe is to be brought into Court on this day thus Prorogued. Wherefore if the Plaintiffs Proctor (making manifeſt his diligence) do exhibit the ſaid Decree or Letters Compulſaries, and teſtify either by an Authentick Certificate, or the Oath of a Mandatory, that all poſſible diligence was uſed in order to Cite the ſaid Witneſſes, and that they do ſo abſcond, or are abſent from their homes, that they cannot be perſonally Cited: Then the Judge doth grant Letters Compulſaries, or a Citation *viis & modis*, &c. againſt the ſaid Witneſſes to the effect aforeſaid: Againſt which time appointed for their appearance in this Citation, the Term-Probatory is alſo to be Prorogued. We need not here ſpeak of the manner and form obſerved in the Executing theſe Citations, having already done it before.

2. This Decree or Compulſary againſt the Witneſſes is to be exhibited, and authentically Certified, and the Contumacy of the Witneſſes accuſed; and if they appear not, they are to be Excommunicate as above, and in that caſe alſo, the Term-Probatory is to be Prorogued againſt ſome competent day, within which time, 'tis probable this Excommunication may be extracted, denounced, and Certified: And if theſe Witneſſes ſtand Excommunicate forty days after the ſame is denounced, the Plaintiff may proceed againſt them (if he will) as in the former Chapters where it is ſpoke of Excommunications, *&c.* and if the Plaintiff do not uſe all diligence in the Premiſes, (*viz.* in procuring the Witneſſes to Excommunicate, Signified, and Impriſoned) then the Proceedings are not to be delayed, in prejudice of the Defendant, but the Defendant may deſire, that the Cauſe may be concluded. And obſerve, that all things ſpoke of in this Paragraph touching the Witneſſes,

take

take place likewiſe againſt the Defendant, if he fall under the like circumſtances, ſo as the Plaintiff cannot proceed for want of his anſwer. Likewiſe though the Plaintiff may uſe all diligence to the effect aforeſaid, yet, (leſt the Suit ſhould be too much prolonged, by this Proroguing the Term-Probatory, whilſt he is in ſearch after the Witneſſes, and getting them Imprison'd, *&c.*) he ought to produce other Witneſſes within that Term if he has any, and becauſe ſometimes the Premiſes are purpoſely managed on this manner by the Plaintiff, (who has a bad Cauſe) to Protract the Suit, and increaſe Charges, to the grievance of the Defendant, who perhaps is poor; the Judge may at the requeſt of ſuch Defendant, proceed to a concluſion in the Cauſe, and pronounce his abſolutory Sentence on the Defendants behalf: Yet the ſaid Witneſſes are to be admitted at any time, before the final Sentence is pronounced; and though it be concluded in the Cauſe, and the Defendant may except againſt the ſaid Witneſſes, in like manner as if they had been produced within the Term-Probatory, or before the concluſion; for by this Production of the Witneſſes, the concluſion in the Cauſe is prohibited or reſcinded.

3. Alſo if only ſome of the Witneſſes are Cited, and the reſt abſcond, ſo as they cannot be Cited: In this Caſe the Plaintiff muſt exhibit the aforeſaid Mandate with a Certificate thereupon, and accuſe the Contumacy of *M. N.* and O. Witneſſes Cited to appear this day, and at this place, *&c.* and deſire they may be reputed contumacious, and (in penalty of this their Contumacy) that they may be Excommunicate. Then they are to be called by the Crier of the Court, and if they appear, they are to be produced, admitted, and ſworn; and the Proctor of the adverſe Party may proteſt againſt, and diſſent from the Premiſes. And as to the Witneſſes which abſcond and cannot be Cited, the Proctor of the Plaintiff may alledge, that the other Witneſſes named in the Mandate, now by him introduced, were diligently ſought, but could not be found; wherefore he muſt deſire, that they may be Cited (to appear on ſuch a day) perſonally, if they can be ſo Cited, or elſe by any other ways and means, ſo as this

Citation

Citation may come to their knowledge; which Petition the Judge grants. Then he muſt deſire, that the Term-Probatory may be Prorogued, as to theſe Witneſſes thus to be Cited, which the Judge likewiſe grants, appointing a day, which ſeems ſufficient for this purpoſe in his reaſon, if diligence be but uſed.

## SECT. 3.

### The manner of producing, Swearing Examining and Repeating the Witneſſes before the Judge, &c.

1. *The manner of producing Witneſſes.*
2. *Their Charges to be tendred before they Swear.*
3. *The Form of their Oath, and the Proteſtation of the Proctor of the adverſe Party, at the time of their Swearing, and his requeſting a time for Interrogatories.*
4. *The manner and form of the Interrogatories to be Adminiſtred by the adverſe Party.*
5. *The manner of Examining, and repeating the Witneſſes before the Judge.*

WE have ſhewn before, what courſe ought to be taken, in order to the getting Witneſſes to be Examined (either before the Judge or Commiſſioners) within the Term-Probatory, or before it be elapſed. We now come to ſhew how they are produced, upon or within this Term. Wherefore the Plaintiff having his Witneſſes ready in Court, muſt acquaint the Judge, that he produceth theſe as Witneſſes upon his Libel, whom he deſires may be admitted, and ſworn to depoſe the truth which they knew touching the ſame. Then if the Defendant has any thing to object againſt the admiſſion of theſe Witneſſes, he is to propound it, before their Oath be Adminiſtred: * and if he propounds nothing, then the Judge admits them.

* *Alciat. de teſt. fol.* 143. *Sect. quæ poſſint cont. teſt. objici.*

2. Now if the Party producing theſe Witneſſes, has not compounded with them, for their Charges of Journey before he produced them, they may (either by themſelves, of

or ſome Proctor in their name) deſire the Judge to order them their Charges before they take their Oath. Then the Judge (taking into conſideration, the diſtance of the Witneſſes Habitation from the place of Judgment, as alſo whether they be Horſe-men, or Footmen, with reſpect alſo to their quality, and their abode at the Court, before their Examination be perfected) is wont to Tax and allow theſe Charges, and order that they be not Examined before theſe Charges be paid; or he may (if the Witneſſes deſire it) Decree a Monition againſt the Party producing them, (if he be not preſent in Court,) but if he be preſent in Court, then is he to be admoniſhed there, to pay the ſaid Charges within a certain day: And in this Taxation, the Judge is alſo wont to allow the Fee of the Monition, as alſo of the Proctor, if the Taxation be deſired by a Proctor: And if the Party producing theſe Witneſſes, take no care to pay theſe Charges, according to the ſaid Monition, the Witneſſes may proceed againſt him by way of Excommunication, and *Significavit* to the Kings Majeſty, according to the uſual manner. Likewiſe thoſe Charges in and about the ſame, are to be Taxed by the Judge, and the Party producing theſe Witneſſes, ought to be compelled to pay the ſame, before he be abſolved, *&c.*

3. Theſe Charges being thus paid or ſatisfied, or ordered in manner as before; the Witneſſes are then to lay their hands upon a Bible, or Teſtament; to whom the Judge ſpeaks in effect as follows *. *Ye are produced as Witneſſes in ſuch a Cauſe, betwixt ſuch and ſuch Perſons; therefore you, and each of you ſhall ſwear, that at the time of your Examination, you and every of you, will depoſe and teſtifie the truth, and the whole truth, ſo far as you know, without any love, favour, affection, or malice to either of the parties in Suit,* &c. † *So help you God.* Which being done, the Witneſſes (in Teſtimony that they take this Oath, in manner and form as the Judge doth Adminiſter it) are to kiſs the ſaid Book. Whereupon the Defendant his Proctor, does diſſent from this production of the Witneſſes, and does proteſt as to its Nullity, and of ſaying or propounding againſt the ſame, and againſt their Depoſitions and Perſons, if they endeavour to depoſe any thing againſt the Intention of his Cli-

* *Alciat. de teſt. fol.* 148. *ubi habeas Juramenti formam; ſicut in Lanfranc. de teſt. depoſ. n.* 3. *praxin ſuæ Speculator. tit. de teſtium Juramento. lib.* 1. *part.* 4.

† *Ponitur queſtio à Lanf. ubi ſupra, an teſtis jurari poſſit ni-ſi pars adverſa ſit citat. n.* 10. *cui etiam Weſemb. conſentit, quod teſtes poſſint jurari parte adverſa preſente, vel abſente contumaciter. ff. de teſt. n.* 5. *lit. E. col.* 1.

ent; and does desire that they may render sufficient and concluſive Cauſes, for their knowledge in what they depoſe, *&c.* and he muſt alſo deſire a competent time may be Aſſigned him, againſt which he may provide Interrogatories to Adminiſter to the ſaid Witneſſes. Whereupon the Judge perhaps Aſſigns a days time, for this purpoſe, if the Witneſſes dwell within the City, or more if they dwell out of the City, or any time before their Examination: Within which time ſo appointed by the Judge, or before the Witneſſes be Examined as aforeſaid, the Proctor of the Defendant ought to give to the Regiſter or Examiner, what Interrogatories he purpoſeth to Adminiſter. But obſerve, that when the Proctor believes the Witneſſes (produced by the adverſe Party,) to be men of good Credit, or ſuch who will ('tis likely) depoſe for the defence, and intention of his Client, it is requiſite that (at the time they are produced) he accept the Perſons, and the production of theſe Witneſſes, ſo far as they make, for his Clients intention, *&c.* but proteſt againſt their Sayings and Depoſitions, in as much as they depoſe any thing againſt the intention of his ſaid Client. In which Caſe the Defendant may reprehend the Sayings and Depoſitions of the Witneſſes, and may object againſt them, if they depoſe againſt his ſaid intention, but yet he cannot except againſt their Perſons, having already accepted and approved them. Therefore the Party producing Witneſſes, had need take care of producing Witneſſes, who will depoſe, (againſt his intention) for the right and defence of his Adverſary: For by this his producing them into Court, he ſeems ſo to approve the Perſons of the ſaid Witneſſes, that he cannot afterward except, either againſt their Perſons, or Depoſitions: In like manner the Defendant had need take care, how he produce Witneſſes which have been already produced by his Adverſary; for he alſo ſeems thereby, ſo to approve their Perſons, as he is not permitted afterwards to except againſt them as above.

* *What theſe Interrogatories are, vide Alciat. ubi ſupra de teſt. & Manual. Jur. de verb. ſig. as alſo their Form.*

4. Now the Defendant or contrary Party, may (when the Witneſſes are to be Examined) Miniſter Interrogatories againſt the ſaid Witneſſes, ſuch as are pertinent, or have relation to the Cauſe or Matter. * *E. g.* If Witneſſes

are

are produced againſt you to prove any Will, which you endeavour to deny or overthrow; you may Interrogate them, if the Teſtator were of ſound Mind and Memory at the time pretended by the Adverſary, wherein he made that Will, and whether he did this or that thing, or ſaid ſuch and ſuch words, which might argue and ſhew the ſoundneſs of his Mind and Memory; or you may interrogate them of other circumſtances, as of the day, the hour of the day, and the place, (*a*) where the Will is pretended to be made, and with what words, the Teſtator approved it, who writ it, as alſo what Witneſſes were by, and preſent then: And as touching (*b*) the Perſons of the Witneſſes, you may Interrogate them, whether they be of Affinity, Conſanguinity, Domeſticks of the Party producing them, or are cloathed by him, or receive Wages from him, or are Indebted to him: And whether or no they be not Enemies to the Party againſt whom they are produced, and the like. And at the end of theſe Interrogatories, you may add this following Petition, or Proteſtation (*Scil.*) That the ſaid Party Miniſtring theſe Interrogatories, does deſire that every Witneſs may render a ſufficient and concluding Cauſe of his knowledge, in all his pretended Sayings and Depoſitions given in this Cauſe, or otherwiſe the ſaid Party Miniſtring theſe Interrogatories, doth proteſt as to the Nullity of this their Examination. I have heard (ſaith Mr. *Clarke*) from ſome Learned Men, (*c*) that this Petition, and Proteſtation are very neceſſary, and that if they were omitted, the Witneſſes (in ſome caſes) make good proof on the Adverſe Party, though they give no concluſive and good reaſons for their knowledge, which otherwiſe they ought to give, if Interrogated or asked. Yet the Proctor who Adminiſters Interrogatories, had need be cautious and expert in the Adminiſtring of them, becauſe they oftentimes do benefit the Party who produceth the Witneſſes, inſtead of injuring his Proof.

(a) *Hæc vocantur Interrogatoria ſpecialia. Ummius diſputatio. 16. Theſ. 10. Jacob. Blum. procur. Cameral. tit. 73. n. 91. & ſeq. Rosbach. proc. civil. tit. 55. n. 3.*

(b) *Hæc vocantur Interrogatoria generalia Rosb. ubi ſupra.*

(c) *Hæc opinio confirmari videtur à Lanfranco de teſt. depoſ. n. 17. Baldo l. ſolum. Cod. de teſt. Weſemb. de teſtibus n. 5. ff. lit. B. p. 913.*

5. Now if the Witneſſes at the time of their Production, were to be publickly, and Judicially examined touching their knowledge in thoſe Poſitions they are produced upon, it is very probable (at leaſt if they were not men

honeſt, and of good repute) they might eaſily ſo conſpire and combine together, as to agree upon one Speech or Story: And ſometimes the Party producing them being alſo preſent, through fear of the ſaid Party, they are apt to conceal the truth, which probably they would otherwiſe confeſs, being that which chiefly makes againſt the ſaid Parties intention. The like may be ſaid of the Defendant. Therefore in all the Courts of the moſt Reverend, the Arch-biſhop of *Canterbury*, the Regiſter (who is ſworn to this purpoſe) after the Witneſſes are Judicially produced and ſworn, in the preſence of the Adverſe (*a*) Party, is wont to Interrogate, and Examine theſe Witneſſes ſeverally, by vertue of their Oath, (upon thoſe things, upon which they are produced) in ſome ſecret place (*b*) all Perſons being removed, and withdrawn, eſpecially the reſt of the Witneſſes, (whilſt the other are Examining) and alſo the Parties in Suit (*c*), and each of their Sayings and Depoſitions, the Regiſter is to draw into Writing, and read the ſame diſtinctly, to every Witneſs ſeverally and apart; and Interrogate and Examine him, and them reſpectively, whether there be any thing writ, that is againſt, or contrary to his Mind: And if the Witneſs deſire a correction, amendment, addition, or ſubſtraction in any thing, he ought immediately to do it. Then the Regiſter ought to take care, that the Witneſſes write their Names or uſual Mark to theſe their Depoſitions, with their own hand, leſt the Regiſter, or any other ſhould afterward vitiate this Depoſition in any particular. Which Examination being perfected by the Regiſter, the Witneſs is to be brought to the Judge, before whom, in the preſence of the ſaid Witneſs, the ſaid Regiſter is wont to read *verbatim*, this Depoſition of the Witneſs, (*d*) which being read, the Judge is wont to Interrogate the Witneſs, whether all things there writ, and read by the Regiſter, be according to his mind and intention, and whether they contain the whole truth of what he has to ſwear; and whether he would have any thing elſe added to this his Depoſition, or ſubſtracted from it: For at the time of his Repetition before the Judge, the Witneſs may deſire (if occaſion be) to have all things by him depoſed, and writ by

(a) *Vide quæ notavi in marg. num. 3. Porx. proced. ad litem juramenti teſtium.*

(b) *Weſemb. ff. d. prob. n. 9. p. 873. lit. A. & de teſt. p. 912. lit. E. Bartol. in l. nullum. Cod. de teſtib. Chilian. in pract. cap. 74. in fin. vide Alciat. de teſt. Sect. de teſtium Examinatione Speculator tit. de teſtific. Sect. nunc tractand. verſ. licet autem.*

(c) *Lanfr. ubi ſupra de teſt. n. 15.*

(d) *Ratio praxis hujus à prædictis eſſe videtur, nempe quia examinatio coram Jud. fieri præſumitur. Alciat. & Speculator cum multis aliis ubi ſupra.*

by the Regiſter to be corrected, and blotted out, or any part of it: But if the Witneſs do there ratify, and approve before the Judge all things ſo writ, and read by the Regiſter in manner aforeſaid; the Examination is then ſaid to be perfect and compleat. For the Examination, though taken by the Regiſter, and having all the due Solemnities obſerved as aforeſaid; yet if the ſaid Depoſition be not acknowledged and repeated before the Judge as above, it avails not. And it is to be obſerved, that not only the Regiſter, (at the time of writing the Depoſition of the Witneſſes) but alſo the Judge himſelf, at the time of their Repetition, is wont often to admoniſh the Witneſſes the danger of perjury *, both to their Body and Soul, if they ſhould depoſe in any thing againſt the truth. Let the Proctor take heed, that the Articles or Poſitions, upon which the Witneſſes are produced, be not dubious or long, containing many and divers heads; for then the Regiſters may very often and eaſily omit ſome particular Poſitions, and neceſſary Clauſes (at the time of Examination of theſe Witneſſes) chiefly relating to the Cauſe inſtituted: Which if they do, the Witneſſes are eaſily deceived, in not depoſing fully to the things contained in the Poſition, and the Party producing theſe Witneſſes, may be in danger of loſing the Cauſe, in regard that theſe Poſitions were omitted. And ſeeing all Poſitions and Articles are uſually writ in Latine, (by reaſon whereof, the Witneſſes, eſpecially Country-men, rarely underſtand them) therefore it is very requiſite, that the Regiſter or Examiner, have a great care in Explaining and Declaring diſtinctly, and plainly to the Witneſſes, all and ſingular the Heads and Contents of theſe Articles and Poſitions. [The Proctors then had need be careful of putting theſe Articles into too elegant a ſtyle; for if they do, they will impoſe too ſevere and difficult a task upon ſome (pretending) Examiners, or Scribblers in the World.]

* *Weſemb. uli s. de teſt. p. 913. lit. B. Alciat. de teſt. Sect. teſt examinatio. fol. 150.*

## SECT. 4.

### The Witneſſes not making a full Depoſition, or refuſing to Anſwer to the Interrogatory, or other Matter on either Party when Examined.

1. *The Petition of the Proctor againſt them in this caſe.*
2. *The Order of the Judge for a fuller Depoſition if need be.*

THe Depoſitions of your adverſaries Witneſſes being publiſhed, if theſe Witneſſes anſwer not fully to any Interrogatory by you Adminiſtred againſt them, or if it chance theſe Witneſſes, at the time of their Examination upon Interrogatories by you Adminiſtred as aforeſaid, do refuſe to anſwer to the ſame, or pretend that they are not bound to anſwer to them: The Proctor Adminiſtring theſe Interrogatories, muſt alledge, that ſuch or ſuch Witneſs or Witneſſes produced on the adverſe part, have not anſwered fully, or not at all, to ſuch or ſuch Interrogatories by him Adminiſtred, referring himſelf to the ſaid Depoſitions and Interrogatories, and to the Law; whereupon he muſt deſire they may be called to anſwer fully to the ſame.

2. Then the Judge, if he be informed that they have not anſwered fully, and that the Interrogatories they have omitted ſo to anſwer to, are pertinent to the Cauſe, and ſuch to which the Witneſſes ought to anſwer, he may Decree as is requeſted; or if he is not informed touching the ſame, he may Aſſign the next Court day to hear his pleaſure upon it; at which time, if he is informed the aforeſaid anſwers are not full, he may Decree them to be called to give fuller Depoſitions or Anſwers; or if he is otherwiſe informed, he may reject the Petition, either tacitely (by proceeding to other things contrary to it) or expreſly: And leſt this Petition be renewed again, before this Decree be interpoſed, it will be requiſite that the

the Proctor of the other Party deny thoſe things ſo alledged to be true, and alledge that this Petition ought not to be granted; and if after that, the Judge do grant the aforeſaid Petition, the Proctor ſo denying it, may diſſent and appeal from ſuch Decree as unjuſt.

## SECT. 5.

## The manner of producing the Witneſſes before Commiſſioners, and the whole Order and Method of proceeding in order thereto, and after it is accepted of by them.

1. *The Cauſes why Commiſſions are granted* ad partes, *for Examining Witneſſes.*
2. *How many fold Commiſſions may be ſaid to be.*
3. *The manner of obtaining, executing, and certifying the Commiſſion, and the manner of Admoniſhing the Proctor of the Adverſe Party to be preſent.*
4. *The manner of obtaining the other ſort of Commiſſion, for Examining Witneſſes within the Juriſdiction of the Judge, and the Form of Proteſtation, made (by the Proctor of the Adverſe Party) at the time of granting the ſame, and the order of his Adminiſtring Interrogatories.*
5. *In what Caſes, and when this Commiſſion may be renewed.*
6. *The manner of preſenting this Commiſſion to the Commiſſioners, and how accepted of, or undertaken by them.*
7. *How proceeded upon, after the Execution of it is undertaken, if the Adverſe Party appear not.*
8. *The Petition of the Proctor, who obtains this Commiſſion, if the Proctor of the Adverſe Party, or his Subſtitute are preſent at the Execution of this Commiſſion; alſo the tenor of ſuch Subſtitution.*
9. *The Petition of the Principal Party, if he appear in Perſon, and not by his Proctor, at the time of Executing this Commiſſion.*

10. *The manner of alledging the Contempt of the Commiſſioners, if they neglect or omit to tranſmit their proceedings, or tranſactions in the Premiſes.*
11. *The manner of certifying the Judge (who grants this Commiſſion) of the Execution of it.*
12. *How this Commiſſion is to be exhibited, and opened before the Judge who granted it.*

IT may probably be objected againſt this method as prepoſterous, in regard that what is here conſidered, as to the manner of obtaining Commiſſions, *&c.* For this purpoſe were only then to be conſidered, when the Letters Compulſaries were obtained for their appearance: Seeing that at the ſame time, theſe Commiſſions are alſo to be obtained: However my hopes is, that the miſtake is pardonable, being it produceth no great error, but may, I hope, render the matter more obvious to every capacity, than if it had been ſpoke of apart. The chief cauſes therefore of Commiſſions, are the remoteneſs of the Witneſſes, from the place of Judgment, their Inability of Body in reſpect of Age, or ſome accident, *&c.* in which Caſe, their Examination is to be made, or brought about, *per ſubſidium* (*a*) *juris*, by a ſupply of the Law. *Alciatus* ſhews the reaſon of theſe Commiſſions to the full, in the place even now Quoted.

(a) *Weſemb. parat. ff. de teſt. n. 5. p. 911. lit. c. Speculator. Sect. 1. n. 45. Alciat. de teſt. Sect. de teſt. exam. verſ. & ubi.*

2. Commiſſions are many-fold, as Authors (*b*) obſerve: Thoſe here meant are of two ſorts, (*Scil.*) the one of them being ſuch, as doth immediately authorize the Commiſſioners, (that is, being the Witneſſes do dwell within the Juriſdiction of the Judge, who grants this Commiſſion) the other ſuch, as doth mediately authorize the Commiſſioners, as where the Witneſſes live in another Juriſdiction; in this caſe the authority of that Judge where they live (*c*) muſt be implored, before their Examination can be compleated; and in this reſpect, it is a mediate authority, depending upon the will of another; which ſort of Commiſſion, is called a Commiſſion *ſub mutuæ viciſſitudinis obtentu.*

(b) *Gail. 1. Obſ. q. 100. n. 11. Ruland. de commiſ. lib. 1. c. 2. n. 8. 9. Ordo Cameral. p. 3. t. 17. Rebuff. in tit. de inquiſ.*

(c) *Lanfr. de teſt. dep. n. 16.*

3. Some-

3. Sometimes it falls out, that divers Witneſſes of the Plaintiff or Defendant, Inhabit out of the Province of *Canterbury*, ſo that they cannot be compelled to appear before the Judges of the ſaid Arch-biſhop, to give their Teſtimony; becauſe no man is compelled to appear before an Incompetent or unfit Judge, (that is, one having no authority to call him.) The Party who intends to uſe the Teſtimony of theſe Witneſſes, muſt alledge to the Judge, that *N. M.* and *O.* are fit Witneſſes, and very neceſſary to prove the Contents of his Libel, or other Matters propounded and given in on his part, and that they Inhabit in ſuch a Dioceſs, without the Province of *Canterbury*, by reaſon whereof they cannot be compelled to appear in this Court, to give their Teſtimony in this Cauſe; and hereupon, he muſt offer himſelf ready to make Oath of it, according to the Information of his Client, which Information he believes to be true; and therefore he muſt deſire a Commiſſion may be Decréed, in order to the enlargement of their authority herein, (and as a ſupply of the Law) to the Reverend Father *M.* Biſhop of the ſaid Dioceſs where the Witneſſes Inhabit, and to *N.* his Vicar general, in Spiritual things, and Official principal, jointly and ſeverally; and that they may be requeſted (in ſupply of the Law as aforeſaid, *& ſub mutuæ viciſſitudinis obtentu*) To compel the ſaid Witneſſes to appear before them, or either of them, on ſuch a day, and in ſuch a place, to give their Teſtimony in this Cauſe; and in order hereunto, he muſt deſire that the Judge will pleaſe to grant his power and authority (ſo much as lyes in him) to the ſaid Biſhop and his Official, jointly and ſeverally, to receive and examine the ſaid Witneſſes, as alſo with a requiſition to deſire them, to Prorogue the day and place of Examination if need be, and that they may alſo be requeſted to certifie and tranſmit (to the ſaid Judge in ſo requeſting) the Sayings and Depoſitions of the ſaid Witneſſes, and all the proceedings to be made, in and about the ſame, on ſuch a day: Alſo the Proctor thus deſiring this Commiſſion, muſt likewiſe deſire, that the Proctor of the Adverſe Party may be Admoniſhed to be preſent at the time of Executing this Commiſſion, if he thinks himſelf

ſelf intereſſed in it. Whereupon the Judge Decrees this Petition of the Proctor, and Admoniſheth the Proctor of the Adverſe Party to be preſent, as is requeſted: And leſt the Term-Probatory ſhould be elapſed before this Commiſſion be Executed and returned; the Judge doth alſo (at the Petition of the ſaid Proctor, obtaining this Commiſſion) Prorogue the Term-Probatory until the Court day following, the day Aſſigned for the tranſmitting of this Commiſſion.

Now this Commiſſion is to be drawn to the aforeſaid effects reſpectively, and is to be preſented to the Biſhop, or his Vicar General, and is to be proceeded upon in all things, in the preſence of the Adverſe Party, like as is ſpoke before, where the Witneſſes are produced before the Judge; or if the ſaid Party appear not, then they muſt proceed upon it in Penalty of ſuch his contempt for being abſent, as is ſpoke hereafter: And the like muſt be obſerved as to its certifying, and other things as is ſpoke afterwards. And it is to be noted, that if the Witneſſes (required to give their Teſtimony, and to appear before the ſaid Lord Biſhop, or his Vicar, *&c.*) do refuſe to appear, may compel them, and Excommunicate them for their contempt: But in their Citation *, or Compulſorial Decrees for theſe Witneſſes to appear, they ought to make mention of the dependance of the Suit in the Court, and before the Judge, who grants this Commiſſion, and that the ſaid Biſhop, or his Vicar do grant this Decree, upon the requeſt of the ſaid Judge, as a ſupply of the Law, *&c.*

* *Lanfr. c. Quoniam de prob. n. 9. Sect. ſed ſi.*

4. Before the Term-Probatory is elapſed, as is before ſaid, the Proctor of the Plaintiff (though he has already produced ſome Witneſſes in Court, or though he has not yet produced any) if he intends to make uſe of a Commiſſion, may requeſt the ſame on this manner (*Scil.*) he muſt alledge to the Judge, that his Client hath ſeveral Witneſſes, (very neceſſary to prove the Contents of the Libel by him given into Court) which are old and infirm, who (by reaſon of the diſtance of the place, the badneſs of the way, eſpecially this Winter time, *&c.*) cannot conveniently appear at the Court, without vaſt charge to his Client,

Client, and the peril and damage of the ſaid Witneſſes: Wherefore he muſt deſire a Commiſſion may be Decreed, granting full Power to ſome honeſt men (conſtituted in Eccleſiaſtical Dignity,) joyntly and ſeverally to ſit in ſuch a place (*viz.*) in ſome Church or Conſiſtory, (in order to Examine the Witneſſes, to be produced before them) upon ſuch days, with Power (if need be) of Proroguing and continuing the days, and place of Examination, having likewiſe ſome Notary Publick, who is indifferent to both Parties: He muſt alſo deſire that ſome Term may be Aſſigned, againſt which theſe Commiſſioners may tranſmit this their Commiſſion, and the proceedings upon it; and likewiſe that the Term-Probatory may be Prorogued until the ſaid day ſo Aſſigned for the tranſmitting the Commiſſion, and that the Proctor of the Adverſe Party, may be admoniſhed to be there preſent, at the time of Executing the ſaid Commiſſion. All which ſeveral Petitions, the Judge grants in expreſs words, in the preſence of the Defendants Proctor, who diſſents from all and ſingular the premiſes, done as well by the Judge, as the Adverſe Party, and proteſts concerning the Nullity of ſuch their doing, and of propounding or excepting againſt theſe Witneſſes, their Depoſitions and Perſons, (as well now as then, and then as now) if in any thing they endeavour to depoſe againſt the Intention of his Client; whereupon he muſt deſire the ſaid Witneſſes may be examined upon ſuch Interrogatories as are to be annexed by him, or his Client to the Commiſſion, or are to be Adminiſtred to them on ſome of the days appointed for the Executing the ſaid Commiſſion before the Commiſſioners; and that they may render good and concluſive Cauſes and Reaſons, (for their knowledge) in their Depoſitions, or otherwiſe he muſt proteſt concerning the Nullity of this their Examination; which Petition the Judge Decrees. In theſe days the Proctors are each of them wont to nominate Commiſſioners, out of which the Judge chuſeth four, (*viz.*) two out of thoſe four named by the one party, and two out of thoſe four named by the other Party: But formerly the Judge (and not the Parties) was wont to nominate all the Commiſſioners, and then they were oftentimes Perſons indifferent

rent to the Parties, though now it is otherwiſe; for the Parties having the naming of Commiſſioners, name only ſuch as are moſt like to befriend them in the matter, if it lye in their way; ſo that commonly they cannot be ſaid to be Commiſſioners of the Judge, but of the Parties, and carry themſelves like Parties when the Witneſſes are Examined; and do oftentimes ſignify to the Parties the Depoſitions of the Witneſſes, before the Publication is made; yea ſometimes before all the Witneſſes are produced. Alſo obſerve, that if the Proctor (againſt whom this Commiſſion is granted,) intendeth not to be preſent at the time of Executing the ſame, nor to adminiſter Interrogatories, at that time of its expedition, he may give what Interrogatories he hath a mind, to the Regiſter of the Judge (who grants this Commiſſion) and he ought to annex the ſame to the Commiſſion, and Seal the ſaid Commiſſion with the ſaid Interrogatories, with ſome Authentical Seal, ſo that the ſaid Interrogatories may not be read, * or looked into, either by the Adverſe Party, or any other, until the ſaid Commiſſion be preſented before the Commiſſioners, and opened by them. Likewiſe obſerve, that though the Defendant do cauſe any Interrogatories to be annexed to the ſaid Commiſſion as aforeſaid; yet may he if he will, (eſpecially if he be preſent at the time of the Production of the Witneſſes) either detract from the ſaid Interrogatories ſo annexed, or Miniſter the ſame, or any others before the Commiſſioners. And obſerve laſtly, that the ſaid Proteſtation of the Proctor of the Defendant, (at the time of granting this Commiſſion) is very neceſſary; for if neither the Proctor, nor his Client, do take care to be preſent at the time of diſpatching this Commiſſion, and the Production of the Witneſſes, but that the Witneſſes are produced in their abſence, *&c.* I have heard (ſaith Mr. *Clarke*) from ſome Learned Men, and ſo I have known it adjudged, that the ſaid party could not in this caſe except againſt theſe Witneſſes, ſo received in penalty of his contempt or abſence; and therefore the ſaid Proteſtation, at the time of granting this Commiſſion, (*viz.* a diſſenting from all and ſingular the Premiſes, or matters done either by the Judge, or the Adverſe Party in and about the ſame, and

* *Alciat. de teſt. Sect. de Interr. fol.* 149.

and a proteſting the Nullity of the ſame, and of objecting as well now as then, and then as now, againſt theſe Witneſſes, their Depoſitions and Perſons) is very neceſſary, and hath the ſame force and effect, as a proteſtation made at the time of producing the Witneſſes.

5. Sometimes it ſo falls out, that the Commiſſioners requeſted to accept the Execution of this Commiſſion, are not at leiſure to diſpatch the ſame, or if having undertaken the Execution of it, yet for ſome lawful Cauſes, either concerning and relating to the Commiſſioners themſelves, or elſe the principal party, they cannot diſpatch the ſame within the time appointed; or if the Proceedings upon the Execution of this Commiſſion, cannot be tranſmitted upon the day Aſſigned for that purpoſe: If theſe Cauſes be alledged by the Party obtaining this Commiſſion, and if the Commiſſioners do by their Letters, or otherwiſe ſignify to the Judge theſe Impediments, this Commiſſion is to be renewed, and the Term-Probatory is to be Prorogued as above, except that the Adverſe Party do alledge that theſe Cauſes are not true, and do offer to prove the contrary: But if he make default in the proof of that his Alledgment, he is not only to be Condemned in Charges, but the Adverſe Party will alſo have reſtitution of him for ſuch hindrance: And on the contrary, if he prove what he alledgeth, he ſhall have his Charges, and the renewing of his Commiſſion muſt be denied the other Party: And obſerve, that Infinite Cauſes may be alledged, in order to the renewing of the Commiſſion, and the Proroguing the Term-Probatory, as the Plague, War, the Mandate of the Prince, ſome Arbitration, Impriſonment of the Party, Poverty, and the like: Which are left to the Arbitriment of a juſt Judge, except in thoſe Caſes where the Law expreſly forbids reſtitution to be made.

6. Now the Party who intends to produce theſe Witneſſes, after he hath obtained the Commiſſion under the Seal of the Judge who grants it, he muſt go or ſend to the Commiſſioners named therein, and muſt take care that they go to the place appointed, upon ſome day Aſſigned in the Commiſſion: Againſt which day the Witneſſes

neſſes which he intends to produce, are to be requeſted to appear before the ſaid Commiſſioners, then ſitting with a Notary Publick (requeſted alſo for this purpoſe) in a place Aſſigned in the Commiſſion, that is, in the Quire or Chancel of the Cathedral Church, or of a Pariſh Church. Then the Proctor obtaining this Commiſſion, or his Client himſelf, or ſome Lawful Subſtitute of the ſaid Proctor muſt ſay as follows: *On the behalf of the Official of the beautiful Court of* Canterbury *on the Arches*, (if he be the Judge who grants this Commiſſion;) or, if the Commiſſion be taken out of the Courts of Audience or Prerogative) *On the behalf of the moſt Reverend Father in Chriſt, the Lord Arch-biſhop of* Canterbury; *I preſent unto you theſe Letters Commiſſional, together with the Libel, Matter, Allegation, or exceptions annexed; and I deſire you will vouchſafe to take upon you the Execution of this Commiſſion, and order that it may be proceeded upon according to the Vigour, Form, Tenor, and effect of the ſame.* Then the Commiſſioners taking this Commiſſion into their hands, do deliver it to the Notary Publick to be read *verbatim*: Which being done, the Commiſſioners take upon them the Execution thereof, in theſe following (or the like) words: (*Scil.*) *Out of the reverence we bear to the Arch-biſhop*, &c. *We take upon us the Execution of this Commiſſion, and do decree that it be proceeded upon according to the Force, Form, Tenor, and effect of the ſame, and we do take this Notary Publick to be the Scribe or Writer of our Acts in this behalf.* Here the Commiſſioners ought to be admoniſhed to take care, what Notary Publick they take unto them in this affair, (except it be the Regiſter of the Court, or ſome other deputed by him) for ſometimes the Party obtaining the Commiſſion, produceth a Notary Publick, who perhaps is a Friend to him, but an Enemy to the Adverſe Party, and deſires him to be accepted of; and therefore in all Commiſſions, there is power given to the Commiſſioners, to take unto them any Notary Publick, who is indifferent to the Parties.

7. If the Original Proctor of the Party obtaining this Commiſſion be preſent, all things following ought to be diſpatched and done in his name, like as if the ſaid Proctor were preſent before the Judge himſelf. But if theſe things

things following are to be done by the Subſtitute of the ſaid original Proctor, as it happens ſometimes; then the ſaid Subſtitute ought in the firſt place to exhibit an Authentical Subſtitution granted him by the ſaid original Proctor, and make his part for the ſame: But if the things hereafter written, are to be done by the Plaintiff himſelf, then he ought to do them under a proteſtation of not revoking the original Proctor, already Conſtituted by him or his Proxy, *&c.* For if the principal Party acts any thing in his own name, or obtains any Petitions of the Judge, if he does it not under ſuch a proteſtation of not revoking the Proctor already Conſtituted by him, the Mandate is revoked *Ipſo facto.* Wherefore the Proctor appearing as aforeſaid, he muſt accuſe the Contumacy of *M.* the Proctor of the Adverſe Party, named in the ſaid Letters Commiſſional, and Judicially Admoniſhed to be preſent in this place on this day, to ſee certain Witneſſes produced and ſworn on behalf of *N.* the Plaintiff, upon the Libel annexed to the ſaid Commiſſion: Who being called, and taking no care to be preſent, he muſt deſire that he may be reputed Contumacious, and in penalty of ſuch his Contempt, he muſt produce *M. N.* and *O.* as Witneſſes to this his Libel, and deſire they may be received, admitted, and have their Oath Adminiſtred. Then the Commiſſioners muſt cauſe the Proctor of the Defendant, to be publickly called three times; and if neither the ſaid, Proctor, his Subſtituted, nor Client do appear, they muſt pronounce the ſaid Proctor Contumacious and in Penalty of ſuch contempt, they muſt admit the ſaid Witneſſes, and Adminiſter them their Oath, as before, at the third Paragraph of this Chapter. And afterward, the Notary publick muſt examin them ſecretly and ſeverally, in the preſence of the Commiſſioners, or ſome one of them. Then the ſaid Proctor, ſo producing theſe Witneſſes, if he hath more Witneſſes to produce, whom he hath requeſted to be preſent, if they come not he muſt alledge that *P. Q.* and *R.* were Witneſſes, very neceſſary † for his Client to prove the Contents of the Libel, or matter annexed to the Commiſſion, and that they were requeſted to appear, on this day, and in this place to give their Teſtimony in this Cauſe, and that though

† *Secunda & tertia dilatio permittitur ſi noneſt prob. ſufficiens ſed non quarta niſi cum ſolennitate legali. Alciat de teſt. Sect. de atteſta. publicatione. f. 150. Lanf. de teſt. depo. n. 40.*

though their charges of Journey, *&c.* were offered, yet they refuſe to come: Wherefore he muſt accuſe the contumacy of *M.* (the Proctor of the adverſe party aforeſaid) who was admoniſhed as before, and taketh no care to be preſent. And deſire he may be reputed Contumacious and in penalty of this his contumacy, he muſt deſire that the ſaid Witneſſes, may be compelled againſt ſuch a day, to give their Teſtimony; then Oath being made of this, by the ſaid Proctor (deſiring theſe Compulſaries) or by ſome ſpecial Meſſenger, appointed to make Faith, (that the Witneſſes were ſo requeſted) and of the Truth of this Allegation; the Commiſſioners muſt cauſe the aforeſaid Proctor, to be called again, three times, upon which if he appear not, they muſt pronounce him Contumacious, and in Penalty of ſuch his Contempt they muſt decree the ſaid Witneſſes to be compelled to appear againſt ſuch a day. Then the Proctor of the Plaintiff (leſt the days aſſigned in the Commiſſion ſhould be elapſed before the Execution and certifying of theſe Letters Compulſaries) muſt farther accuſe the Contumacy, of the Defendant his Proctor, *&c.* and in penalty thereof, he muſt deſire the day and place (for the further expedition of this Commiſſion) to be continued, and prorogued until ſuch a day and place: Upon which, the Commiſſioners (after the ſaid Proctor, has been three times called as before) do pronounce him Contumacious, as is deſired, and in penalty, *&c.* they prorogue the further expedition of the Commiſſion, until ſuch a day (and ſuch hours of the day, and to ſuch a place) againſt which, the party requeſting this prorogation, believes it poſſible for him to get the ſaid Witneſſes ready to appear. For if this prorogation were not made, and that in penalty of the Contempt, of the adverſe party his Proctor; the ſaid Proctor (the days aſſigned in the Commiſſion being elapſed) would not be Contumacious, for not appearing in the place and on the day, ſo prorogued, or continued; whereas now if he appear not at that time ſo prorogued or continued, he becomes as contumacious, as if all things had been done on the days, and in the place limited in the Commiſſion. And obſerve that generally, nothing is to be requeſted by the Proctor (at whoſe Inſtance, this Commiſſion is granted,)

not

nor any thing to be decreed by the Commiſſioners, except it be ſo done, in penalty of the Contempt of the Proctor of the Adverſe Party, who is to be called, Accuſed, and Pronounced, contumacious in manner aforeſaid.

8. If the Proctor of the Adverſe Party or his Subſtitute are preſent, at the time of diſpatching this Commiſſion; the Proctor of the Plaintiff, muſt preſent the Commiſſion, and the Commiſſioners muſt accept the Execution of it, and do all things, in like manner, as was even now ſpoke; and if this Proctor of his Adverſary, or his Lawful Subſtitute, (Exhibiting his Subſtitution in Writing under ſome Authentical Seal, or publick Inſtrument, or at the Act of Court, of the Judge who grants this Commiſſion) do appear, the Witneſſes are to be produced, and a Prorogation, or continuance of the Cauſe or Commiſſion to be decreed, (if upon juſt Cauſes, it be requeſted by the Party obtaining the Commiſſion) and all in ſingular the premiſſes, are to be diſpatched in his preſence, and he is to be Admoniſhed to be preſent, at the day and place ſo Prorogued, and if he appears not then, they may proceed in penalty of his contumacy: And if theſe things are ſo done, in the preſence of the Proctor of the Adverſe Party, or his Subſtitute as is before ſaid; the ſaid Proctor, or Subſtitute ought to proteſt, and diſſent, like as the principal Party doth, when the premiſſes are diſpatched in his preſence, of which, in the following number. Now it is requiſite we know how this Proctor muſt be Subſtituted; ſeeing we ſaid before, that in every Proxy, or Mandate, given by the Client, there is Power given to the Proctor, to Subſtitute another in his ſtead, ſo often as he chanceth to be abſent. Therefore the Proctors, as well of the Plaintiff, as of the Defendant, (if they are not conducted by their Clients to be preſent at the Execution of the Commiſſion,) are wont to Subſtitute in their ſtead, one or more Notaries, or Litterate Perſons, reſiding in thoſe parts, where the Commiſſion is to be Executed, to act and do all things neceſſary (for the ſaid Proctor) in and about the expedition of the ſaid Commiſſion, and what the ſaid Proctor may or can do, if he were preſent in perſon: And in this Subſtitution, he ought to add, that he is ready to ratifie and confirm what

ſoever his ſaid Subſtitute ſhall do in the premiſes; and this Subſtitution ought to be Sealed with an Authentical Seal, and delivered to the Party ſo Subſtituted, with Inſtructions and Interrogatories, requiſit in theſe caſes; And here it is to be noted, that if neither the Original Proctor of the Adverſe Party, nor the Party himſelf be preſent, at the time of the expedition of the ſaid Commiſſion, but ſome other who pretends himſelf to be a Subſtitute of the ſaid Proctor, and who exhibits a Subſtitution, in the name of the Defendants Proctor; it is very requiſite, that the Proctor of the Plaintiff take diligent heed, that the ſaid Subſtitution be Authentick, and ſufficient, for otherways all things done in the preſence of ſuch ſuppoſed or Unlawful Subſtitute, are void in Law and do not prejudice the Defendant, nor advantage the Plaintiff.

9. But if neither the Proctor of the Defendant, nor his Subſtitute are preſent, at the time of Executing the aforeſaid Commiſſion, but the principal Party himſelf, (to whom perhaps his Proctor has ſent Interrogatories, to be Adminiſtred to the ſaid Witneſſes of his Adverſary) then muſt the ſaid Party, (under Proteſtation of not revoking the Proctor already by him conſtituted in the Cauſe) diſſent as above, at the production and ſwearing of the Witneſſes, and then Adminiſter his Interrogatories, if he has any ready, or which are annexed to the Commiſſion; or elſe he muſt deſire a Term may be aſſigned him, to Adminiſter the ſame: Which Term or Time, the Commiſſioners do aſſign according to their Pleaſure, having reſpect to the number of Witneſſes, and the weightineſs of the Cauſe; but the Party thus appearing, had need be cautious how mention is made of this his Petition in the Acts of Court; that is, that it was made under ſuch a Proteſtation, of not revoking his aforeſaid Proctor; neither let him diſſent from any Petition of the Adverſary, except under that Proteſtation, leſt (as is ſaid above) he ſeem to revoke the Proctor already conſtituted by him; the Witneſſes are to be Examined as before.

10. Now although in every Commiſſion, granted to remote parts, for the Examination of Witneſſes, a certain day is aſſigned to the Commiſſioners, for the tranſmitting their proceedings

ceedings as above; yet if the Commiſſioners, take not care to tranſmit this their proceedings, upon the day aſſigned them for that purpoſe, they cannot, or (at leaſt are not wont) to be Excommunicate; therefore in this caſe, the Proctor, who obtains the Commiſſion, (leſt his Term-Probatory ſhould be elapſed before the ſaid proceedings be tranſmitted) may alledge the not Tranſmiſſion of it, to this following purpoſe, (*Scil.*) he muſt alledge that his Client, at a convenient time and place, took out a Commiſſion to remote parts, in order to Examin Witneſſes, *&c.* and that it was duly preſented to the Commiſſioners, named therein, and by them accepted, and diſpatched according to the contents thereof, and that the ſaid Commiſſioners, at leaſt *N.* their Notary publick, whom they took unto them upon this account, takes no care to Tranſmit their proceedings thereupon, though duly requeſted thereto, and upon the premiſſes, he muſt offer himſelf ready to make Faith, and Proof; and deſire the Judge his decree, to call them to Anſwer in a Cauſe of Contempt, or to anſwer Articles relating to their Contempt, and alſo deſire that his Term-Probatory may be Prorogued, until ſome further convenient day. This Petition (if the Proctor makes Faith of the Truth of it,) the Judge is wont to grant, appointing a competent time, as well for the appearance of the Commiſſioners, as alſo for the Prorogation of the Term-Probatory: Except the Adverſe Party deny this Allegation, and do alledge, and take upon him to prove the contrary: Who if he make default in the Proof thereof, not only thoſe things (ſo requeſted by his Adverſary) are to be granted, but he is likewiſe to be condemned in Charges for retarding the proceedings. And obſerve that in theſe accidents, it is not required that there be full and exact Proof, but the Judges are wont to decree the Petition, upon the bare Oath of the Proctor; ſo as it appear by the relation of the Regiſter, that the Commiſſion was duly extracted: And this Oath muſt be taken not *de veritate*, (as to the poſitive Truth of the matter) but *de credulitate*, (as to the Proctors belief) according to the information given him, which he believes to be true, (*viz.*) that the ſaid Commiſſion has not been preſented, or certified to the Judge. Therefore that the Commiſſioners may avoid

this trouble, let them take care to ſignify to the Judge (who grants this Commiſſion) by their Letters miſſive, the reaſons why they could not Tranſmit this Commiſſion, on the day aſſigned for this purpoſe.

11. This Commiſſion being Excuted the Notary publick who was made choice of, to exhibit, and diſpatch the ſaid Commiſſion, ought to draw a certain Certificate or publick Inſtrument, in the name of the Commiſſioners and direct the ſame to the Judge who granteth this Commiſſion; and in this Certificate, not only the Depoſitions of the Witneſſes (and all things acted and done by vertue of the ſaid Commiſſion) are to be inſcribed or inſerted, but alſo the ſaid Letters Commiſſional, the Interrogatories Adminiſtred by the adverſe Party, and the Subſtitutions (if any were exhibited) are to be annexed to the ſaid Certificate, and then the Certificate, ought ſo to be Sealed with ſome Authentical Seal, that it may neither be looked into, read, or altered in any particular: But the Notary ought to Subſcribe this Certificate with his hand, and Seal it with his Notaries Seal; and it is likewiſe neceſſary, that the ſaid Notary do take care, that each leaf of the Depoſitions be Subſcribed, not only by the Witneſſes, but alſo by the Commiſſioners; for I have ſeen it objected (ſaith Mr. *Clark*) that the Notary hath corruptly Tranſcribed the Depoſitions of the ſaid Witneſſes, and likewiſe ſometimes the Witneſſes have ſaid they have not depoſed ſo as is contained in the ſaid proceedings ſo Tranſmitted: Which if they ſhould chance to ſay, when the Depoſitions are Subſcribed in manner as aforeſaid, they may eaſily be convinced.

12. You have now heard how this Commiſſion is to be certified, *&c.* And ſeeing it is ſaid to be neceſſary for the Notary publick, to take care to Subſcribe every leaf of the Depoſitions, it is likewiſe equally neceſſary for the ſame reaſons, that the Notary publick Tranſmit the Original Depoſitions themſelves; for otherways (though all things were done, in manner as above) yet in the Tranſcribing or Copying of them, theſe Depoſitions are wont to be Copyed or Tranſmitted corruptly, or at leaſt not ſo exactly as they ought. But if the Notary publick, doth not Tranſmit the Original Depoſitions, but Copies, he ought

to

to take diligent heed, that the Originals be kept ſafe in his cuſtody, ſo that if any ſcruple ariſe, touching the Truth or Falſhood of the proceedings ſo Tranſmitted, it may eaſily be decided by exhibiting the Originals. And from the aforeſaid Cauſes, eſpecially to avoid fraud, (at leaſt the ſuſpicion of fraud) it is very neceſſary that in the Commiſſions for Examining the Witneſſes the Commiſſioners be Admoniſhed, to Tranſmit the Original Acts and Depoſitions. Which being done, and being Tranſmitted in the Form of a publick Inſtrument as is ſaid above, the Proctor who obtaineth the Commiſſion, (if the Notary publick who diſpatched the ſame is not preſent,) he may procure any other Notary publick, to exhibit this proceeding, upon the Examination of the Witneſſes, on behalf of the Scribe or Writer of the Acts of the ſaid Commiſſioners, *&c.* And then the Proctors muſt joyntly exhibit the ſaid proceedings, in as much, as they make for their parts, or the Intereſt of their Clients: Yet the Proctor of the Defendant, (immediately upon the Judge his accepting the ſaid proceedings) muſt proteſt, as to the nullity of all the proceedings, and of excepting againſt the ſame, if they make in any thing againſt his Client. But the Proctor who obtained this Commiſſion, may upon the ſame day, deſire publication of the Witneſſes or may defer publication of them, until he be compelled to requeſt it, by the adverſe Party, deſiring a concluſion in the Cauſe or Acts preparatory thereto, (*viz.*) a Term to propound all Acts, *&c.* in plenary Cauſes, and to hear Sentence, in Summary Cauſes; and in all things elſe it muſt be proceeded in, as when the Witneſſes are produced before the Judge.

## SECT. 6.

### Of the Publiſhing of the Atteſts or Depoſitions of the Witneſſes and the producing more Witneſſes; together with Exceptions Replications, &c.

1. *How and when the Depoſitions of the Witneſſes are publiſhed and how the adverſe Party doth proteſt againſt the ſame.*
2. *How and in what caſes the Plaintiff may upon the ſame matter produce Witneſſes after publication, and when he is prohibited ſo to do.*
3. *The manner of renouncing the Term-Probatory and how it accurs to the other Party.*
4. *The manner of Corroborating the Plaintiffs Witneſſes, and when it may be done.*
5. *The manner of Excepting againſt the Witneſſes of the Plaintiff, and how many fold theſe Exceptions may be ſaid to be.*
6. *By whom theſe Exceptions ought to be given into Court, (*Scil.*) the Defendant himſelf, and the reaſon for ſuch practice.*
7. *What remedy the Witneſſes may have, if they are defamed by theſe Exceptions.*
8. *Of Replications to theſe Exceptions what they are, and their manner and form.*
9. *Why other and further delays or liberty of Exceptions are not permitted except in ſome caſes. And when and in what manner the Defendant may by way of Duplication, Corroborate the Perſons and Sayings of his exceptive Witneſſes.*

IF the Proctor of the Plaintiff, believes that he has ſufficiently proved the intention of his Client, and intends to produce no more Witneſſes, he muſt requeſt the Judge, that he will pleaſe to publiſh the Depoſitions of the Witneſſes, produced on his part, and decree Copies thereof

to his Client: Which the Judge † accordingly doth. Then the Defendant if he has any matter to propound which is directly contrary, he muſt diſſent from the publication of theſe Witneſſes, * and proteſt that he is not informed what the Witneſſes already Produced, and Examined have depoſed: For if he does not ſo diſſent and proteſt, and doth afterward give in a contrary matter, if the Plaintiff doth object, that he hath been informed of the Depoſitions of the Witneſſes, this matter is not to be admitted, becauſe it is preſumed, that by propounding this matter, he hath been informed of the Depoſitions of the Witneſſes, of his Adverſary, and hath thereby loſt the benefit of a contrary defence; whereas on the contrary, if the aforeſaid proteſtation be made, then any concluſive and pertinent matter may be admitted, though it be directly contrary to the propoſitions, upon which the Witneſſes were Produced, Sworn and Examined, and whoſe Depoſitions are publiſhed as is aforeſaid: Except the other Party, alledge and prove, that the Party propounding this matter (notwithſtanding the aforeſaid proteſtation) is informed of the Depoſitions of the Witneſſes: And to prove this he may compel the ſaid Proctor of the Defendant, (or the Defendant himſelf, who propounds this matter, or both of them) to Swear, † that they are not informed of the Depoſitions of the Witneſſes, of the adverſary, either by themſelves or any other: And the Judge likewiſe in this controverſy (if it be requeſted of him) is wont to ask the Regiſter, whether he or any of his Clarks, writ out any Copies of the Depoſitions of the Witneſſes, and ever gave them to the adverſe Party, his Proctor, or Sollicitor: And if the Party propounding this contrary matter in the premiſſes, can no way be convinced of having been informed of the Depoſitions as aforeſaid then the ſame matter ought not to be rejected. But becauſe ſometimes after the aforeſaid Oath is taken, and the ſaid matter is admitted, the Party thus propounding doth procure Copies of the Witneſſes of his Adverſary, and by this means, informs himſelf of the Depoſitions of the ſaid Witneſſes, and upon the ſaid contrary matter, endeavours to produce Witneſſes. If the Proctor of the Plaintiff, doth ſuſpect the Defendant in the premiſſes,

† *Judex volens atteſt. publicare, partes citare ſeu vocare debet, aliter non ſint aperiendæ. Alciat. de teſt. Sect. de atteſt. publica. Weſem. ff. de teſt. n. 5. p. 914. lit. B. Specul. Sect. ſatis. per dict. c. cum veniſſent. Zouch. p. 59. 9. elementa juris.*

* *Ratio hujus proteſtationis traditur ab Alciat. ubi ſ. Sect. de teſtium reprobatione. fol. 151. & Weſemb. ubi ſupra. n. 6. p. 916. ad finem ejuſdem, Ferrarienſis forma juram. teſtium, ub. proteſtan. n. 2. per cap. præſentium cod.*

† *Lanfranc de teſt dep. n. 40. Sect. ſervata deb. ſolemnitate. quando quis dicatur didiciſſe teſtificato vide com. n. 33. & 38, 39. imo. interdum ſuper capitulis omnino contrariis ibid. n. 42.*

he may desire the said Oath to be Administred again, at the time of producing the Defendants Witnesses, upon the said matter: And then if the Proctor doth not purge the premisses by his oath, or if he is convict herein, the said Witnesses are to be repelled though the said matter were admitted, and a Term Assigned for proving the same.

2. If the Plaintiff, or Defendant (who when * he excepts is made Plaintiff) produce Witnesses, and get their Depositions published, and are instructed what the said Depositions are, yet if after the said publication, and such their information of the Depositions †, other Witnesses very necessary on their parts come to their knowledge, (the matter remaining whole *, that is, before the Cause be concluded) if they are present in Court, they may produce them, and they are to be received, and admitted. But if these new Witnesses refuse to appear unless they be compelled; the principal Party himself, and not his Proctor (for his Proctor, in his general mandate hath no mandate to do the matters following) must appear in Court, and alledge that (without any design of revoking the Proctor, already by him constituted *M. N.* and *O.* are Witnesses very necessary to prove the contents of the Libel on his part, and that he was informed that they were such, only since the publication of the Witnesses already produced on his part, in this Cause, and not before: And upon the premises he must offer himself ready to make proof, and therefore desire those Witnesses, so present in Court (which he there produceth) may be received and admitted, and that they may have their Oath Administred, to depose faithfully upon the contents of the Libel, already given into Court by him: Or if the Witnesses (being requested to be present) do not come, he must alledge that these Witnesses were requested to appear on this day in this place, to the effect aforesaid, and that he offered them their Journey Charges: And upon the premisses, he must likewise offer himself ready to make proof, and must desire, that these Witnesses, may be compelled to appear upon such a day, to give their Testimony, *&c.* then the Judge (unless the adverse Party do alledge, that he is informed that the Party desiring these new Witnesses to be admitted, had some

* *Lanf. c. quoniam, n. 8. Myns. Inst. de Action. text. supereſt, n. 11. Gail. 2. obſ. 81. n. 8.*

† *Lanfranc. de teſt. dep. n. 34, 37. & in. n. 42. verſic. Aliud ſubjungo.*

* *Omnino videtur eſſe contrarium eisquæ notantur in cap de Litis conteſtatione, res integra enim eſſe dicitur, ante litis conteſtat. & a multis ſic æſtimatur poſt quam lis ſit conteſtat. niſi a Domino Clark. & (ni fallor) ita intenditur à Myſingero in Inſt. de mandatis. Sect. Recte n. 1, 2, 3, 4, 5. ſaltem à parte Actoris ſed a parte Rei ſatisdationem attendimus.*

ſome knowledge or probable notice of them, before the other Witneſſes, already Examined were publiſhed, or that the Cauſe in which ſuch admiſſion of the Witneſſes is requeſted is of that nature, that they are not to be admitted) ought to admit them, if they be preſent in Court, or elſe he ought to Decree them to be compelled to appear if they are abſent, proof being firſt made, by the ſaid Party [ ſo deſiring them to be admitted, ] that the ſaid Witneſſes are neceſſary, and that he knew not they were ſo neceſſary, only ſince the publication of the former Witneſſes; as alſo that the ſaid Witneſſes were requeſted to come, and had their Charges offered them. Upon which, the other Party diſſents from the premiſſes, and proteſteth as to the Nullity of the ſaid Proctor or principal Party, and alledgeth that it is no concluſive Petition in Law, and therefore ought not to be granted, and that the publication of the Witneſſes, already made by the adverſe Party, and the information he hath had of what is already depoſed, are reaſons ſufficient, why the ſaid Petition ought not to be granted, and that there is great ſuſpicion of Subornation of Witneſſes, referring himſelf to the Law, and the Acts of Court. Now in ſome caſes, it may neceſſarily be concluded, that the Party ( who deſires theſe Witneſſes to be thus produced ) muſt know before of theſe Witneſſes he now deſires to produce: As in a Teſtamentary Cauſe, when the Witneſſes already produced do depoſe that the Party deſiring to produce theſe Witneſſes, was preſent ( at the time of making the Will ) together with theſe Witneſſes, whom he pretends are but lately come to his knowledge. Likewiſe in a Cauſe of defamation, if the firſt Witneſſes do depoſe, that the words defamatory, were ſpoke in the preſence of the Plaintiff and thoſe Witneſſes, ( whom he deſires to produce anew ) and ſo in all other the like caſes; and this probable knowledge is ſufficient to hinder the aforeſaid Witneſſes ſo as no new Witneſſes are to be admitted, unleſs that Party, ſo deſiring this new production of Witneſſes do by his Oath make clear this his knowledge, or the vehement preſumption of his knowledge, by Swearing expreſly, that he ſaw not theſe Witneſſes, or did not call to mind, until after the other Witneſſes were produced, and their Depoſitions

ſitions publiſhed) that theſe Witneſſes were ſo preſent. For in a Teſtamentary cauſe, it might ſo fall out, (as ſome times it doth) that ſome of the Witneſſes might be in the next room, or liſtening through the ſeiling, *&c.* to hear what is done by the Teſtator, about the condition of his Will: And though perhaps the Witneſſes already produced might ſee or know that the ſaid Witneſſes were ſo liſtening, yet the Party ſo endeavouring to produce new Witneſſes as aforeſaid, might not ſee, nor know that they were ſo liſtning. Alſo in a Cauſe of defamation, if the defamatory words mentioned in the Libel, were uttered in ſome publick place, (as the Church, or Street where People are for the moſt part converſant) it may often ſo fall out, that the People paſſing by may hear and note theſe words, and the Witneſſes already produced as is aforeſaid, might likewiſe ſee theſe perſons ſo paſſing by, and ſo conſequently might depoſe that they were preſent, though the principal Party (being probably ſtirred up to Anger by theſe defamatory words) might not ſee theſe Witneſſes: And to theſe may alſo be added, that if theſe words were uttered many months before the action was begun, the Plaintiff may probably have forgot all the Witneſſes that were preſent, though he ſaw them then; and he may now call to mind what Witneſſes were preſent, becauſe the Witneſſes already produced by him, have depoſed that they were preſent: But the Plaintiff as is ſaid above, ought expreſly to Swear (if his adverſary urge it upon the premiſes, becauſe (as was even now ſaid) his knowledge in the premiſſes is preſumed.

3. Now if the Party who hath a Term-Probatory Aſſigned, believeth (before this Term-Probatory is elapſed) that he hath proved his intention ſufficiently, he may renounce this Term-Probatory, and not only deſire the Depoſitions of the Witneſſes to be publiſhed, but alſo he may deſire a Term may be Aſſigned to hear Sentence in Summary Cauſes, and to propound all Acts, *&c.* in Plenary Cauſes reſpectively, and get a concluſion in the Cauſe, if nothing be propounded by his adverſary: Though it is otherways, if your adverſary in that time (ſo Aſſigned for your Term-Probatory) or on any other day, before you renounce this Term-Probatory, do accept this your Term-Probatory; and

and does proteſt to uſe the ſame, for in this caſe, though the Party who had this Term-Probatory Aſſigned him, may requeſt publication of the Witneſſes by him produced, yet he cannot, whileſt this Term depends (which is common † to both Parties) obtain an aſſignation to hear Sentence, or to propound all Acts, *&c.* in prejudice of his adverſary, who requires the ſame right (by accepting the Term-Probatory of his Adverſary) as if the Term had been appointed abſolutely to him, to prove any matter, and were yet in dependance; and admit that Party, who (as is aforeſaid) did proteſt to uſe the Term-Probatory of his Adverſary, do propound, or prove nothing at all during the ſaid Term, yet may he after it is elapſed, propound and prove any matter whatever. But enquire, whether the ſaid Party ſo hindering his Adverſary by his ſaid proteſtation, may not very deſervedly be condemned in Charges, for retarding the proceedings: I think he ought (ſaith Mr. *Clarke*) if he proves nothing.

† *Myns. Inſt. de Bonor. poſſeſſ. Sect. ſiquis itaq; n. 3. Lan. de dilation. n. 6.*

4. The Plaintiff alſo may propound any corroborative matter, (on behalf of his Witneſſes already produced) in that day or Term Aſſigned to the Defendant, to prove his exceptions, and ſo he may uſe the Term * of his Adverſary (as is ſaid above,) and may confirm the Perſons or Depoſitions of his Probatory Witneſſes; or he may defer it, until the Term (Aſſigned to the Defendant to prove his exceptions) be elapſed: And then if he diſſents from the publication of his Adverſaries Witneſſes, and proteſteth that he is not informed of their Depoſitions, *&c.* he may propound a matter, corroborating as well the Depoſitions, as the Perſons of his Witneſſes, and obtain a Term-Probatory, in order to the proof of it. Likewiſe, if the Plaintiff has produced two or more Witneſſes to prove his Libel; and afterwards the Defendant, by way of exception doth blaſt or incommode the ſaid Witneſſes, or ſome of them at leaſt, ſo that there are not two left, which are of Credit, and do concord in their Depoſitions: Then if theſe Witneſſes are defamed by ſuch Exceptions, (whereas it doth not appear, that the Party producing them had any knowledge or ſuſpicion of their being ſuch Perſons, ſeeing all men are preſumed honeſt, until the contrary appear) the ſaid Party

* *Lanfran. ubi ſupra.*

whoſe

whoſe Witneſſes are defamed, may either Corroborate his former Witneſſes, or he may produce any other Witneſſes whatſoever [directly] upon his Libel, as if none had been already produced. For the Laws ſay, that two Witneſſes do make ſufficient proof; † and therefore the Plaintiff by producing two Witneſſes, may probably make them ſerve.

† *Lanfranc. de teſt. dep. n.* 25. *& ſeq.*

5. We come now to the manner and method obſerved in excepting or reproving Witneſſes; and this is done either againſt their Depoſitions or Perſons, and may be done * either before or after the Depoſitions of the Witneſſes are publiſhed. Theſe ſort of Exceptions, ſeem to me to be thoſe which were called Peremptory Exceptions in the foregoing diviſion; under theſe are alſo comprehended Replications, *&c.* in this place is ſpoke of the Exceptions, (*a*) urged againſt the Witneſſes of the Plaintiff, and this is done two ways, in general, and in ſpecial. 1. In general: As when the Defendant hath no particular exceptions to propound in Writing to hinder the concluſion in the Cauſe, or he may by word (*b*) of Mouth, to be inſerted into the Court Acts, except againſt the Witneſſes, produced on his Adverſaries part, that they are various, wavering in their Depoſitions (*c*) ſingular and diſagreeing, contarying and repugning one another in their Sayings and Depoſitions; that they are intimate Friends to the Party producing them, and Enemies (*d*) to the Party againſt whom they are produced; that they are affectionate, partial and as it were concerned upon the account the Party for whom they are produced; of an ill fame, Vicious, Poor Indigent and of Conſanguinity, or Affinity, or Domeſticks, and kept within the Family of the ſaid Party producing them: And are cloathed, and receive a ſtipend by the ſaid Party, and laſtly, ſuch to whom no credit is to be given: Which allegation the Party ſo excepting, muſt put, and deſire to be admitted: Then the other Party muſt proteſt, that the ſaid allegations ſo made by *N.* are falſe, and muſt proteſt of the generality, undue ſpecification, the ineptitude, the Nullity and the inconcludency of theſe exceptions, and alledge, that the ſame ought not to be admitted, and therefore deſire they may be rejected: And all things being ſo done, by the Party excepting and by the other Party diſſenting; the Judge doth

* *Alciat de teſt. fo.* 151. *Lanf. ubi. s. n.* 38. 43. *Sect. Quæro.*

(a) *Hæ exception. ſumuntur à circumſtantia perſonàqualitate dictorum à forma examinationes. de quibus Weſemb. plenius notavit, ff. de teſt. n.* 7. *ſpecul. Sect.* 1. *in princip. c. quoties. n.* 9, 10.

(b) *Lanfran. de Excep. n.* 11. *ſi proponatur per modum exceptionis ſufficit verbo coram judice explicare.*

(c) *Quando teſtis ſingularis dicitur Lanfr. de teſt. n.* 20. 23. *per tot.*

(d) *Quæ Cauſæ repellunt teſtem à teſtimonio, copioſe tractatur à Lan. ubi ſupra à numero* 54. *ad num.* 96.

doth admit theſe exceptions, ſo far as by Law they are to be admitted, and then if it is requeſted of the Proctor of the Adverſe Party, the Judge is wont to Aſſign the Party propounding theſe exceptions, a Term-Probatory, to prove theſe exceptions, and alſo a Term to ſpecifie theſe general Exceptions; it may alſo be Decreed (though it is rarely practiſed) for the principal Party to anſwer to theſe general Exceptions; at leaſt if the Proctor propounding them, take his Oath that he believes, he may be relieved in any part of them, by the anſwer of the principal Party or the Adverſary himſelf; But if the Plaintiff believe, that the Defendant has propounded theſe general Exceptions, with an intent, unjuſtly to deferr the Sute, and to hinder a concluſion in the Cauſe, he may (before theſe Exceptions are admitted) deſire that the Oath of Calumny may be Adminiſtred to the Defendant ſo excepting: In which caſe, the Act of Court or Allegation of the Plaintiff *N.* who diſſents (from the Petition made by the excepting, and requeſting the anſwer of the Plaintiff to his exceptions) and proteſts of the Nullity of ſuch Allegation, and of taking his Oath, to obſerve on his part, all and ſingular the heads, contained in the Oath of Calumny, and deſiring, that the ſaid Oath of Calumny may be taken by the Adverſe Party. And if the ſaid Defendant or Party excepting do refuſe, or at leaſt do not take the ſaid Oath, then the Judge ought not to admit but reject this Allegation † expreſly, or tacitly, proceeding to a concluſion in the Cauſe, or ſome other Act contrary to this admiſſion of the matter, if it be requeſted; and if theſe general Exceptions are admitted, and a Term-Probatory is given; though the Party propounding theſe general Exceptions, do afterward, (either whileſt the Term-Probatory aforeſaid depends, or after it is elapſed) propound more ſpecial Exceptions, or declarations of theſe general Exceptions, yet a new Term-Probatory is not to be given, as is ſaid afterward, when we ſhew what the Term to propound all Acts is. But here it is to be noted, that ſo often as any matter or Allegation is given in, the Proctor of the Adverſe Party, if he cannot take the Oath of Calumny as above; yet he may take this following Oath (*Scil.*) that in propounding this matter or Allegation

† *Lanfr. de teſt. dep. n. 43. Sect. Quæro numquid poſt publicatas atteſt. excep. dars. poſſint contra perſonas teſtium, ſi juravit non malitioſe ſe opponere, etiam ſi pars excipiens opponit contra perſonas teſt. tempore juramenti præſtationis.*

legation, he doth it not out of a malicious Mind nor unjuſtly to defer the Sute; and that he believes his Client can prove the ſame: Which Oath if he takes, the ſaid matter is to be admitted, ſo as it be otherways concluding. 2. Exceptions in ſpecial, are thoſe which are propounded in Writing, containing the Cauſes, why a Witneſs is not a fit Witneſs, (*viz.*) becauſe he is infamous * ſpecifying how, and from what Cauſe this infamy ariſeth; or that he is Vitious, an Adulterer, or Perjured in ſome Cauſe, or ſome part of his Depoſition; ſpecifying as above, the Manner, Form, and Time of ſuch Perjury. Then theſe exceptions being admitted, they are to be repeated, and the principal Party is Decreed to be Cited to anſwer thereto, and Witneſſes are to be produced to prove the ſame, or elſe a Commiſſion is to be Decreed unto remote parts as before, in order thereto: And note likewiſe, that before the admiſſion of theſe ſpecial Exceptions, the Adverſe Party may requeſt, from the Party propounding them, either the Oath of Calumny, or the Oath even now mentioned.

* *Lanf. ubi ſupra. n.* 46. *crimen objectum debet ſpecificari. n.* 45.

6. Now ſeeing the good name, and fame of any Perſon, is much more damnified in a publick Court, and by writting objecting their Crimes, than out of Court by word of mouth only, ſeeing Letters writ are permanent, and not ſo apt to eſcape Peoples Memory; and although the Party propounding theſe Exceptions, ought (as is daily practiced, if it be requeſted by the Adverſe Party) to take the Oath, that he propounds not the ſame out of a Malicious Mind, or unjuſtly to defer the Sute, and that he believes he can prove the ſame, as before: Yet when the Parties in Sute have a bad Cauſe, and deſire to protract the Sute, and avoid not only the Oath aforeſaid, but alſo all Actions which may be commenced againſt them, by reaſon of their propounding theſe famous Libels, they procure ſome poor Vagabonds, or object Wretches, (who have no certain Habitations) by vertue of a ſpecial Proxy, made to this ſole purpoſe, to propound theſe Exceptions, againſt the Witneſſes of the Adverſary, who are perhaps, Perſons of great Credit, and good Fame, and altogether unknown to the Party, who propounds theſe Exceptions: From which ſpecial Proctor, neither the aforeſaid Oath

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can be required, nor can it be taken by him, (with a ſafe Conſcience at leaſt) becauſe he knew not the Witneſſes; neither have theſe ſaid Witneſſes, any action of defamation againſt this ſpecial Proctor, becauſe he cannot pay Charges or hath no certain Habitation: Therefore to remedy this, the office of the Judge is to be implored in theſe Caſes, by the Proctor, againſt whom the ſaid Exceptions are propounded to deny Audience to the ſaid ſpecial Proctor, and for the Cauſes aforeſaid, to reject the ſaid Exceptions, unleſs ſome ſubſtantial and convenient Perſon, or the Party himſelf (who is in Sute) come inſtructed in the ſaid Cauſe; from which Party, not only the ſaid Oath, (that he propounds not theſe Exceptions, with intent unjuſtly to defer the Sute) may be requeſted; but alſo an Action of defamation, may be inſtituted againſt him, if he fails in the proof of theſe Exceptions ſo given in by him. But whether or no, for the rejecting the ſaid Exceptions, (ſo given in as above, by the ſpecial Proctor) there is not given to the Party propounding thoſe Exceptions, a juſt Cauſe of appeal, enquire of the Learned. I have often ſeen (ſaith Mr. *Clarke*) the ſaid Exceptions, rejected, when they were ſo offered, by a ſpecial Proctor; but I never ſaw any appeal interpoſed, upon ſuch rejection.

7. That the Witneſſes may commence Sute, againſt the Party propounding and giving in theſe defamatory Actions is what Mr. *Clarke* hath even now been ſpeaking, and is not doubted: The particular form of proceeding upon ſuch defamation, will be diſcourſt afterward.

8. To theſe Exceptions of the Defendant, againſt the Plaintiff, his Probatory Witneſs, ſucceeds next the Plaintiff his Reply, againſt the Defendants exceptive Witneſſes; Now though the Plaintiff has produced Witneſſes, to Corroborate the Sayings and Depoſitions of his Probatory Witneſſes and has got their Depoſitions publiſhed, yet may he at any time, before the Cauſe is concluded, propound Exceptions, as well againſt the Sayings, as the Perſons of the Defendants exceptive, or reprobatory Witneſſes, (notwithſtanding that the Defendant has got the Depoſitions of his ſaid Witneſſes publiſhed) and may obtain a Term to prove theſe his Replies, againſt the ſaid exceptive Witneſſes;

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With limitation, that he cannot Reply or Except againſt the ſaid reprobatory Witneſſes Depoſitions, unleſs he add in this Reply, that they were ſuborned, and corrupted to depoſe ſo, as they have depoſed, in their Depoſitions, is contained (which words of their Depoſitions, ought to be recited word by word;) for if this Quality of their Subornation is not added, that Allegation is directly contrary to the Depoſitions of the ſaid Witneſſes and ought not to be admitted: But it is otherways, if the Defendant in the aforeſaid Exceptions doth alledge in general, that ſuch a Witneſs of the Plaintiff, did commit Adultery with ſuch a Woman, named in the Exceptions, no certain time being expreſſed; or perhaps (as is ſometimes alledged) in ſuch years, (reciting diverſe years) or in ſome one of them; and the Witneſſes of the ſaid Defendant do depoſe, that the ſaid Witneſs of the Plaintiff, in ſuch a year, or ſuch a day or month of the ſaid year, committed Adultery or was taken in Adultery with ſuch a Woman; in this Caſe, the Plaintiff may (after the Depoſitions of the Witneſſes of the ſaid Defendant are publiſhed) alledge directly contrary, and object Perjury to the ſaid Witneſſes of the Defendant, nor is he bound to alledge the corruption of the ſaid Witneſſes; becauſe in this Caſe, the Plaintiff (before ſuch publication of the Witneſſes) could not foreſee how to purge the Innocence of his Probatory Witneſſes, from ſuch a Crime objected, by reaſon of ſuch generality, of the aforeſaid Allegation. But obſerve alſo, that the Defendant may deſire, that the Plaintiff (who propounds, and alledgeth this corruption of the Witneſſes) do Swear, that he believes he can prove the Subornation aforeſaid, or otherways the ſaid Replies or Exceptions againſt the Depoſitions of the Witneſſes of the Defendant, are not to be admitted, unleſs in the Caſe above mentioned in this number: But let us admit this Oath be taken, as to the corruption of the Witneſſes, and that the Party alledging the ſame, do not prove the corruption of the Witneſſes as is alledged, but doth prove directly, that the ſaid Witneſſes have depoſed falſely, and are Perjured, whether or no in this Caſe, ought the Plaintiff to ſuffer the Law, not having proved the Subornation alſo as he alledged? I think not (ſaith Mr *Clarke*) becauſe

becauſe a falſity in their Depoſitions, being proved, a corruption may eaſily be preſumed: At leaſt I have known it ſo adjudged. We need not trouble you again, to tell you what a Replication is, ſeeing at the ſame inſtant, when we define, and ſhew what an Exception is, we alſo ſhew what a Replication, *&c.* is.

9. Now if the Plaintiff produce Witneſſes to prove his Libel, the Defendant may except againſt the Depoſitions, as well as the Perſons, of the ſaid Witneſſes of the Plaintiff, and theſe Witneſſes of the Defendant, are called reprobatory Witneſſes, or Witneſſes reproving the Probatory Witneſſes: Againſt theſe reprobatory Witneſſes, the Plaintiff may alſo except by way of Replication, and that both againſt their Perſons, and Depoſitions; and theſe Witneſſes are called Witneſſes reproving the reprobatory Witneſſes of the Defendant, produced againſt the Plaintiff his Probatory, † Witneſſes. If the Plaintiff hath not Corroborated the Sayings and Perſons of his Corroboratory Witneſſes, whether produced by him, in the firſt or ſecond place, he may (with the ſaid Exceptions, which he gives in againſt the Plaintiffs reprobatory Witneſſes, or immediately after the ſaid Exceptions are ſo given in) Corroborate the Sayings and Perſons of his Probatory Witneſſes: But the Defendant is forbid to except againſt theſe reprobatory Witneſſes produced by the Plaintiff: Which ſort of practice is prohibited by that general Rule, *In teſtem teſtes, & in hos, ſed non datur ultra.* * Yet the Defendant may Corroborate the Sayings, and Depoſitions of the Witneſſes, produced on his part, upon the Exceptions or reproofs given in by him, againſt the Probatory Witneſſes of the Plaintiff, ſo as he do it, before the publication of the Depoſitions of the Witneſſes produced by the Plaintiff, upon his Replies to the Defendants Exceptions aforeſaid; at leaſt (ſaith Mr. *Clarke*) I have ſeeen it ſo practiſed. And though *Alciatus* in *T. de teſt.* §. *de teſtium publicatione*; *Weſemb. in ff. T. de teſt. n.* 5. *p.* 913. *Lanfranc. de teſt. dep. n.* 40. ſeem all of them to conclude that four delays are not permitted, without ſome ſpecial Solemnity, or Favour of the Law, yet *Lanfranc* at the Fortieth Number of the ſaid Chapter hath theſe words afterwards; (*Scil.*) *non Intelligo tamen de dilatione in præſenti materia;*

† *Lanfr. de teſt. n.* 49. *&c.*

* *De hiſce productionibus, plene tractatur a Lanfranc. ubi ſupra, n.* 49. *ſi autem utraq; pars produceret teſtes probatorios, tunc utriq; parti conceduntur* 3. *ei. dilationes.*

*materia, prout verbum ſonat, ſed pro examinatione; licèt quod trina examinatio concedatur ſine aliqua cauſæ cognitione, & quarta.* So that he ſeems not to contradict by this, what *Mynſinger* and others affirm (*Scil.*) that the Parties may except againſt each other in theſe peremptory and perpetual Exceptions, even until a *Quadruplication.* At the Forty ninth Number afore quoted, *Lanfranc* ſpeaks fully to the matter, when he ſays that if both Parties produce Probatory Witneſſes, (that is, ſuch as are intended, only to prove the matter they give in to Court, and not to reprove the Witneſſes of their Adverſary) then each Party, is permitted to have three delays. Which is thus; the Plaintiff hath one, to prove his Libel or firſt matter, the Defendant a time to except. The Plaintiff another for his Reply to thoſe Exceptions; the Defendant another time for his duplication or double plea; the Plaintiff another for his triplication; and then the Defendant another time for *Quadruplication* †.

† *De hiſce latiùs videas apud Myns. Inſt. Tit. de Exceptionibus & Replic. per tot.*

## SECT. 7.

### Of another ſort of proof which is made by Inſtruments.

1. *What Inſtruments are.*
2. *How many fold Inſtruments may be ſaid to be.*
3. *When they may be exhibited.*
4. *The manner of exhibiting theſe Inſtruments.*
5. *The proteſtation of the Proctor of the Adverſe Party, at the time of exhibiting theſe Inſtruments.*
6. *The manner of getting a Term Aſſigned to propound all Acts,* &c. *in order to a concluſion.*

HAving ſhewn above, the order and manner of proof to be made *viva voce*, order requires we come next to ſhew the order and manner of proof, to be made *mortua voce*, which is done by Inſtruments: And theſe are ſaid to be writings made upon matters or things to be done amongſt

mongſt men. More ſtrictly taken, they are Tables or Writings whereby we make known, or prove our intention before the Judge. More largely taken, they are ſaid to comprehend all thoſe things wherewith the Cauſe is Inſtituted or Conſtrued, † in which ſignification, Witneſſes are alſo contained.

† *Ummius diſputatio. 17. Theſ. 1. n. 2. Lanf. de Inſt. prod. n. 2, 3, 4, 5. Alciat. cod. tit. f. 153. Weſem. ff. T. de fide Inſt. n. 1. Ferrar. in pract. de form. Inſtrum. ad verb. exhiberi.*

2. Inſtruments are for the moſt part, two fold, (*Scil.*) either publick or private.

Publick * Inſtruments are thoſe which are made by publick Perſons. And of theſe there are many ſorts, five of which are commonly obſerved.

1. An Inſtrument drawn under the hand of a Notary Publick, or other Publick Perſon, either in, or out of Court.

2. That which is Sealed with ſome Publick or Authentick Seal (though writ by a private) as of a Prince, City, Univerſity, or Colledg.

3. All writings whatſoever (thô private) which are exemplified, by the authority of the Judge or Magiſtrate.

4. All ſuch writings as are taken out of publick Regiſtries, *&c.* or thoſe made at the publick Act.

5. Thoſe writings which are ſubſcribed by the Perſon and Witneſſes. And this is publick as to its effect.

* *Weſemb. ubi ſupra n. 2. ſchurff. conſil. 7. & 29. cent. 1. Ferra. in forma prod. Inſtrum. ad verb. exhibens n. 5. Lanf. ubi ſupra. n. 9. Alciat. etiam ubi ſupra. fol. 155.*

Private Inſtruments are ſuch as are made without any Solemnity, and they are either.

Accounts.

Private Inventaries or Regiſters.

Private Letters, betwixt one Friend and another, one Tradeſman and other.

3. Theſe Inſtruments may be exhibited both before, and after publication of the Witneſſes, before it be concluded in the Cauſe but after it is concluded in the Cauſe; † they

† *Alciat. de Inſt. editione. Sect. quando ſint exhib. fol.* 154.

are not to be exhibited unleſs ſome new matter ariſe, which hath dependance upon the former.

4. The Proctor who exhibits theſe Inſtruments, muſt acquaint the Judge, that as a further ſupply of the proof of his Libel, or other matter or Allegation, *&c.* he doth exhibit certain Indentures, or ſuch a writing, beginning thus (here he muſt mention the firſt line of the ſaid writing) and ending thus, (here he muſt mention four or ſix words at the end of the ſame) and alledge that theſe Exhibits, are Subſcribed and Sealed with the Hands and Seals mentioned in the ſame; and that they were given and delivered by the Perſon or Perſons therein named, as their own proper Act: And further, that the contents thereof are true, and were acted and done, as is therein contained: Which Allegation (having ſo made or put jointly and ſeverally) he muſt deſire may be admitted, and that Right and Juſtice may be Adminiſtred to him and his Client. Which being admitted by the Judge, and repeated in full force, by the Party propounding the ſame, and the Judge the Proctor exhibiting the ſaid Inſtruments, ought to Swear that he hath faithfully put this Allegation, and the Exhibits; and then deſire the Proctor of the Adverſe Party, to Swear to make a faithful anſwer to the ſame, againſt the next Court day. But if the ſaid Exhibits are ſome private writings, ſo that the Proctor exhibiting them doth not believe, he can be relieved by the anſwers of the Proctor of the Adverſe Party, then he muſt deſire the anſwers of the principal Party himſelf, as in other Cauſes. But obſerve, that if theſe Exhibits or Inſtruments are Sealed with ſome authentical Seal, (to wit the great Seal of *England*, or of ſome Biſhop or Eccleſiaſtical Judge) then the anſwers of the Proctor of the Adverſe Party are rather to be required; becauſe in theſe caſes he may be better inſtructed, (what to believe as to the ſaid Seals) than his Client. If the Plaintiff or Defendant has ſome old Manuſcripts, or Books, which he deſires to exhibit as neceſſary proofs on his part: He muſt ſay that he doth Exhibit certain old Manuſcripts or Books beginning, and ſo ending as above; and alledge that they are old, and have been faithfully kept, in the Cuſtody of ſuch an one, (*viz.* ſome publick Office

or

or Perſon;) and that they are ſuch, to which great Credit is wont to be given, as well in as out of Court. Which Allegation being propounded, admitted and repeated as before, he ought to take his Oath, *&c.* and deſire the Oath to be taken, by the Proctor of the Adverſe Party to anſwer as above, or he may deſire for the principal Party himſelf as above. And obſerve that if the aforeſaid Manuſcripts or Books, are long, ſo that the Regiſters cannot get them Copied without great Charges, then the Proctor muſt take care, to get a true Copy (of ſuch a part of the Manuſcript, as makes for his intention and purpoſe) to be writ out of it, and then exhibit them as above, adding theſe words (and eſpecially ſuch a Clauſe or ſuch words, in ſuch a line of the Inſtrument, or in ſuch a leaf, of the Book or Exhibit, together with a Copy of the ſaid Clauſes or Words.) And he muſt deſire that the ſaid Clauſes or Words, ſo writ out, may be Examined with the Originals, and Collated, and that ſuch Collation being made by the Regiſter, (of the Clauſes or Sentences aforeſaid, with the Originals) the ſaid Originals may be redelivered, and as much Faith may be given to the Copies Collated, and to the Regiſters, as to the Originals themſelves: Which Petition, the Judge Decrees; yet the Party exhibiting the Premiſſes, (to the end that the Proctor of the Adverſe Party or the Party himſelf, may ſee theſe Exhibits, and ſo inform themſelves, what they believe or can anſwer) ought to leave theſe Original Exhibits, in the Cuſtody of the Regiſter, until the Proctor of the Adverſe Party or the Party himſelf give their anſwer: And in this caſe the Party exhibiting the Premiſſes, ought only to pay the Regiſter for Regiſtring that Clauſe, which he took out of the Indentures or Exhibits: For it is to be noted, that no Exhibits, (whereof mention is made in the Acts) ought to be redelivered to the Party exhibiting them, unleſs the ſame be Regiſtred to perpetual Memory. Therefore let the Proctor who Exhibits the Premiſſes, take care that he requeſts the Judge, to Decree the ſaid Exhibits to be redelivered, after they are Regiſtered; for otherways without the Decree of the Judge, the Regiſter ought not, nor is he bound to redeliver the ſaid exhibits, though they be Regiſtred.

5. At the time of exhibition of these Instruments; the Proctor of the other Party, must say that he doth dissent from the exhibition of these pretended Exhibits, and protest as to the Nullity, and Insufficiency of the said Exhibits and alledge that the said Exhibits are private writings, and Inauthentical, and such to which no Credit ought to be given, and therefore he must desire they may be rejected; but if any Instrument be exhibited under the Kings Seal, it is not safe for the Proctor so to deny it, or protest that it is a private Seal as above. And observe, that if (at the time of exhibition of these Instruments) the Proctor thus protesting can inform himself either by inspecting them, or any other way, that the same do make in the least for his Client, the said Proctor ought then to say, that he excepts these Exhibits, and the exhibition of them, in as much as they make on his part, but he must otherways dissent and protest against them, as above. Nay it is but expedient that the Proctor of the Adverse Party, do accept these Exhibits of his Adversary, and the exhibition of them, though he is altogether ignorant, whether they make for his Client or not: For if it should so fall out, that they should make for his Client in any respect, and he not having accepted them, but on the contrary having alledged that they are such, to which no Credit ought to be given, and having denied the truth of them; the Party exhibiting these Instruments, may subduct them at any time, before they be accepted, which he could not do if they had been accepted by his Adversary: Therefore Mr. *Clarke* concludes, that such an accepting of the Instruments is very profitable, and ought not by any means to be omitted. And therefore may suffice to have said of proofs.

6. Now if the Defendant like a subterfuge, endeavours by delays to defer the Cause, (which is a thing frequently done by Defendants) and will not propound his defensive matters all at once, but now one, now another, (*viz.*) now his Exceptions, and then his matter of Defence; which delays, the Proctor of the Plaintiff may avoid, and prevent thus: So soon as the Defendant has given in one matter, and his Term-Probatory is elapsed: Or whilest this Term-Probatory doth depend, or when it is so elapsed, doth

doth afterward give in another matter; the Proctor of the Plaintiff muſt alledge to the Judge, that *N.* the Defendant hath propounded a certain matter, and has had a Term-Probatory Aſſigned him to prove the ſame, which is elapſed, and that now he gives in another matter, to protract the Sute: Wherefore that theſe Sutes may be brought to a concluſion, he muſt deſire, that the Judge will Aſſign the ſaid Defendant a competent Term to propound all Acts, which conſiſt in ſuch a fact, (*viz.*) two or three Court days next following, according to the Quality, and Weightyneſs of the Cauſe; which requeſt the Judge grants. And if on that day ſo Aſſigned or before, the Defendant doth not propound all his defenſive Pleas, he cannot alledge † or propound any thing afterwards, nor ask a Term-Probatory upon them, at leaſt as to Witneſſes, unleſs ſome emergent cauſe fall out, betwixt the day wherein this Aſſignment was made, to propound all Acts, *&c.* and the day which was ſo Aſſigned for this purpoſe: That is, unleſs the Plaintiff give in ſome Allegation of Defence, or exceptive matter againſt the Witneſſes of his Adverſary, or becauſe this Term (ſo Aſſigned to propound all Acts) depending, the Cauſe by the mutual conſent of the Parties, doth ſtand on arbitration as it were, or becauſe ſome other neceſſary defence, came to the knowledge of the Party, after the day Aſſigned to propound all Acts was elapſed; for then in theſe or the like caſes, it is Lawful for the Defendant to Reply, * and propound a contrary matter, notwithſtanding the ſaid aſſignation to propound all Acts, *&c.* In like manner alſo the Plaintiff hath propounded one matter, and the Term being elapſed which is Aſſigned to prove ſuch matter, he gives alſo another matter; the Defendant may likewiſe in this caſe, deſire a Term may be Aſſigned to the Plaintiff, to propound all things which are further to be done; which requeſt the Judge likewiſe grants. And generally in a matrimonial Cauſe, (which is the moſt favorable and priviledged Cauſe of all others) the ſaid aſſignation to propound, and prove all Acts, doth not hinder, but that defenſive matters may be propounded, and Witneſſes may be produced, as is obſerved afterward, where it's ſpoke of producing Witneſſes in matrimonial Cauſes.

† *De hac materia vide Lan. ubi plenius notatur in c. ſæpe, n. 43, 44, 46. ubi datus eſt terminus per judicem ad producendum inſtrumenta, poſt terminum non poſſunt produci de rigore juris, licet de æquitate produci poſſint, dummodo producens non fuerit in negligentia durante termino, putá, quia ignorat, &c. ita certè poteſt intelligi de teſt.*

* *Vide quæ ſupradicitur in fine Sect. præcedent. & in marg. de Exception. & Replicat.*

# CHAP. V.

## *Of the* CONCLUSION *or concluding in Cauſes; its Manner and Form; and the Things Preparatory in order to it.*

### SECT. 1.

### Of the Term which is Aſſigned to propound all Acts, in order to this concluſion.

1. *The Things Preparatory to Concluſion, what they are, and how done.*
2. *What the Term Aſſigned to propound all Acts is; and what Acts may be done on this day, ſo as to reſcind the Concluſion.*
3. *Witneſſes may be admitted or rejected on this day Aſſigned to propound all Acts,* &c.
4. *The ſuppletory Oath what it is, and when and in what Form Adminiſtred.*
5. *The Manner of propounding and invoking all Acts,* &c. *and deſiring a Term to be Aſſigned to conclude.*
6. *What Act induceth a Concluſion, and how the Defendant may hinder it, on this day.*

PUblication of the Witneſſes being made, the Plaintiff (in Summary Cauſes,) muſt deſire a Term to be Aſſigned to hear Sentence: And in plenary Cauſes he muſt deſire a Term to be Aſſigned, to propound all Acts, *&c.* in order to a Concluſion in the Cauſe: Which the Judge accordingly doth. Then the Defendant, if he believes it neceſſary for his Client to uſe exceptions, againſt the Witneſſes of his Adverſary, or any contrary defence, he ought to diſſent from this aſſignation, *&c.*

2. Now

2. Now this Term to propound all Acts, (as Mr. *Clarke* has been informed ) is not named in the whole body of the Law, † and it is ſaid to be rather a Term of the Judge, than of the Law, to take away the delays; the Defendant may (on that day ſo Aſſigned to propound all Acts, in plenary Cauſes, and to hear Sentence in Summary Cauſes ) give in any Exceptions, or defenſive matter, or he may add to thoſe which are formerly given in on his part, if any ſuch be, and declare them, by way of poſitions additional: By the admiſſion of which, or the aſſignment to hear the pleaſure of the Judge upon the admiſſion thereof the concluſion is reſcinded; at leaſt if theſe exceptions or this matter were admitted afterward, though alſo on the ſaid day, Aſſigned to propound all Acts, or to hear the Sentence, the Cauſe were not continued in the ſame State, wherein it then was until the next Court day. Yet obſerve, that though poſitions additional be ſo admitted, yet another, or new day is not to be given wherein to prove the ſame, if another Term-Probatory was before given to prove that ſaid matter, to which theſe are as it were declaratory; but theſe poſitions additional or declaratory, are to be proved within that Term ſo already given.

† *Publicatione facta, ſi tranſacto termino, nihil detur contra teſtes, terminus dari conſuevit ad producendum omnia Inſtrum. Acta & Munimenta. ita Alciatus, de teſt. f. 150. Lanfr. de Cauſ. Deleg. & Sum. c. Sæpe. n. 43, 44.*

3. Alſo if on this day, thus Aſſigned to propound all Acts in plenary Cauſes and to hear Sentence in Summary Cauſes, either the Plaintiff or Defendant have any neceſſary Witneſſes, preſent in Court, and do make Oath (as was ſaid before ) that they are Witneſſes neceſſary on his part, the Judge may Admit, Swear and Examine them, although the other Party may object, that the matter cannot longer be ſaid to be *res integra*, or whole, and that the Law or right, doth acquieſce on his part, by reaſon of the ſaid aſſignation to propound all Acts in Plenary Cauſes, and to hear Sentence in Summary Cauſes. And this Allegation is to be propounded, and objected, by the Proctor of the Adverſe Party, when the Witneſſes are produced in this caſe; yet it is left to the breſt of the Judge, whether he will admit or reject theſe Witneſſes, and neither Party hath any juſt Cauſe of appeal. This Mr. *Clarke* ſaith he has obtained in a Court of Controverſy, forty years agone.

4. Sometimes

4. Sometimes it ſo falls out that there is not ſuch full proof made as by Law ought to be; therefore in this caſe, in this part of the proceedings, the Oath called the ſuppletory Oath, is wont to be Adminiſtred. This Oath is properly called the *Juramentum neceſſarium*, the neceſſary Oath, which (when there is a want of full proof,) the Judge upon knowledge of the Cauſe (though the Parties requeſt it not †) may Adminiſter to either the Plaintiff or Defendant. And this neceſſary Oath, is divided into Suppletory (to which this definition now given doth agree,) and Purgatory; which Oath the Judge (the Cauſe being known) may impoſe upon him, againſt whom the preſumptions ſeem chiefly to make, *&c.* Now when there is either nothing, or the whole matter proved, then there needs not this Oath to be Adminiſtred; when there is but half proof, then this Oath ought to be Adminiſtred; either to the Plaintiff or Defendant, at the pleaſure of the Judge; * when the Plaintiff hath one proof, and the Defendant one, then this Oath ought rather to be Adminiſtred to the Defendant ſeeing we ought rather to incline to Mercy than Judgment. Wherefore if the Plaintiff has not fully proved, but yet has made ſomewhat more than half, or only half proved his intention, he may appear before the Judge, under the form following, and taking the following Oath, (for his Proctor * cannot take this Oath, having no ſpecial Authority to do it in his general mandate.) *I* N. *without the leaſt intention of revoking my Proctor, do alledge that I have more than half, or half proved (at leaſt) my intention in ſuch a Libel, &c. Allegation, or other matter, referring me to the Acts of Court and to the Law; and therefore I deſire that the Suppletory Oath, may be Adminiſtred to me, and that Right and Juſtice may be done.* Then the Proctor of the Adverſe Party, muſt deny theſe things ſo alledged to be true, and proteſt as to the Nullity thereof, and alledge that this Oath ought not to be taken, refering himſelf to the Laws. Then the Judge will Aſſign to hear his pleaſure upon this Petition, and to receive Informations thereupon: And if it do appear, that thoſe things are true which are alledged by the Party who deſires this Oath (that is, that he hath proved his intention, more than half, or half at leaſt) then this Oath is wont to be Adminiſtred

† in

† *Ponitur & ſolvitur hæc Quæſtio ab Arnoldo Vinnio in ſelæ. juris 99. l. 1. c. 43. Sect. nimirum paria. Gail. 1. obſ. 108. n. 3. & ſeq. de verb. ſignif. verbum. Juramentum. Mynſ. Inſt. de Action Item. ſi. 3. in & 86. obſ. lib 1. obſ.*

* *De hiſce etiam vide Alciat. de Jurament. f. 158. de Act. Sect. Item ſi quis n. 3. 4. Mynſ. Inſt.*

* *Alciat. ubi ſupra fo. 159. Sect. Procurat. in tribus caſibus poteſt deferre Juramentum.*

† in ſuch caſes as the Law permits: Therefore conſult the Learned what theſe caſes are in which this Oath, ought to be Adminiſtred. The Party taking this Oath, muſt Swear, that to his certain knowledge, thoſe things are true, upon which he deſires ſo to be Sworn. And this Oath ought to be Adminiſtred before the Cauſe is concluded, and if it is not Adminiſtred then, * it ought to be requeſted again after the Cauſe is concluded; for in this caſe, the Judge may Adminiſter this Oath, either before, or after the Concluſion of the Cauſe; but not unleſs it were ſo deſired before. Likewiſe if the Adverſe Party do prove that the Party who deſires this Suppletory Oath, is Infamous, Vitious, and of no Reputation or Eſtimation, then this Oath ought not to be Adminiſtred in any caſe.

† *Hi caſus enumerantur ab Alciato ubi ſupra f. 159. Sect. in Juramenti dilatione 4. ſpectanda. Weſemb. etiam in ff. de jure jurando n. 10. lit. Ep. 646.*

* *Alciat. ubi. ſup. fol. 159. Qualitas perſonarum conſideranda, Weſemb. ubi ſupra n. 10. in fine. Jaſon. in l. penult. Sect. hoc Judicium. n. 6. ff. nequis eum qui. Bartol. in dict. l. admonend. Chilian. in pract. c. 66. niſi rei perſona ſit legalior, vel actor veritatem ignorare putetur.*

5. Alſo on this day thus Aſſigned to propound, and invoke all Acts, *&c.* the Proctor, who hopes to obtain Sentence in the Cauſe, muſt ſay in Court, that he doth there exhibit all the Acts, or things inacted, brought into Court, alledged, propounded, and exhibited, proved and confeſſed in that Cauſe, ſo far as they make on his part; and deſire that a Term may be Aſſigned to conclude againſt the next Court day; and the other Party alſo, if he have any hopes of the Cauſe, he muſt alſo on the ſame manner, exhibit all Acts, *&c.* ſo far as they make on his part; and let him not diſſent from the aſſignation to conclude; but if he deſpairs of the Cauſe, he may then diſſent from the exhibition and propounding the Acts, and from ſuch aſſignation to conclude. This exhibition of all the Acts, and this aſſignation to conclude, do induce the Concluſion in the Cauſe; a Concluſion is alſo induced, not only by the exhibition of the Acts themſelves and the Aſſignment to conclude, but alſo, when nothing at all is done, on that day ſo Aſſigned to propound all Acts, as in the following number.

6. Now the Defendant on this day (Aſſigned to propound all Acts, *&c.* in Plenary Cauſes, and to hear Sentence in Summary Cauſes) if he intends to uſe exceptions againſt the Witneſſes of his Adverſary, or any contrary defence, ought to propound his exceptions againſt the Witneſſes, either in general, at the Act of the Court (as they term it) or in particular or *ſpecificè* in writing; or he ought

to

to give in any other defensive matter; for if he gives in nothing on this day, thus appointed to propound all Acts, &c. in Plenary Causes, and to hear Sentence in Summary Causes then is it concluded in the Cause on that day, as much as if they had exhibited, and propounded all Acts, &c. nor is the Plaintiff, or Defendant permitted afterwards, to propound any matter or exceptions †.

† *Conclusum esse dicitur ubi partes renunciaver. omnes exceptiones, sed renunciatio per alteram partem tantum non nocet alteri. Lanf. de excep. n. 3. & de test. dep. n. 42. 41. Alciat. de renuntiatione & conclusione. per tot. fol. 162.*

## SECT. 2.

## Of the Term or day appointed and set apart for this conclusion.

1. *What a conclusion is, and when it may be said to be concluded, upon some one particular Article.*
2. *The form and manner of the Proctors concluding and getting a time Assigned for Sentence.*
3. *What effect such an assignation so to hear Sentence, (the Adverse Party being then present, but not being admonished to be present at the time thus Assigned for Sentence) hath in Law.*
4. *The manner of giving Informations to the Judge, in order to Sentence.*

* *Manual. Jur. de verb sign. Roding. Pand. Camer. lib. 3. t. 36. pr.* † *Emeric. pr. t. 70. n. 7. quilibet articulus habet suam instantiam Baldus. l. 1. cod. de Juramento Calum. n. 3. Castrensis. auth. in isto jur. Sect. quod observari. num. 10. cod. cod.*

TO conclude in the Cause, is nothing else, but to renounce all further discussing and disputing the matter, and to submit the controversy to the knowledge of the Judge. Therefore the Conclusion of the Cause, is a Judicial Act, whereby the Cause, or some Article of the Cause is accounted for concluded; so that there is no room left for the Parties further disputation. * Now it sometimes falls out, that there is an Allegation † given, which concerns not the principal business, but some other emergent Cause: e. g. *I object against the Certificate of the Citatory mandate, by vertue whereof I was Excommunicated, that it is fictitious, and false; or I alledge, that I have compounded the Cause and produced Witnesses upon this Allegation, and publication, those*

*thoſe Witneſſes being made, I have alledged my intention in this Allegation, to be ſufficiently proved, referring me to the Acts, and to the Proofs, and have deſired that my Client may be abſolved inſtantly, and the Adverſe Party to be condemned in Charges which are made in the proof of the ſaid Allegation.* And the Judge in preſence of the Proctor of the Adverſe Party, denying this Allegation (that is, that I have proved my intention) by me made, to be true hath Aſſigned to hear his pleaſure, upon the next Court day. But if on that day, the Judge, at my petition (alledging and deſiring aforeſaid,) do Aſſign to hear his pleaſure upon this my petition, (as before) upon the next Court day, in preſence of the Proctor of the other Party; then theſe two aſſignations, or this ſecond aſſignation for one and the ſame thing do induce a concluſion in the Cauſe, as to this emergent Article, † neither is it Lawful for the Adverſe Party to except againſt the ſaid Witneſſes, nor propound any thing contrary to the Allegation, and Petition aforeſaid.

† *Lanfranc. de teſt. dep. n.* 41. *verſ. Aut eſt facta renunciatio ſpecialiter ſuper uno articulo & non poſſint admitti probationes.*

2. On this day which is thus appointed to conclude on, the Proctor, at whoſe Petition, it was ſo Aſſigned to conclude, muſt acquaint the Judge, that he doth now with his permiſſion conclude in this Cauſe, and deſire that he will pleaſe to grant a concluſion therein; to whom the Judge Replies, we conclude with the Party thus concluding. Then the Plaintiff muſt deſire that a Term may be Aſſigned, to hear Sentence, againſt the next Court day: Which the Judge doth grant accordingly: If the Defendant is diffident of the Cauſe, he may diſſent from this concluſion, and aſſignation aforſaid: But if otherways, then he may conclude with the Party, and the Judge ſo concluding, and let him not diſſent from this aſſignation, to hear Sentence. The Premiſſes may be done and requeſted, by the Proctor of the Adverſe Party, though this Term for the concluſion, were not Aſſigned at his Petition; for ſometimes the Party deſiring to propound all Acts, *&c.* or to conclude, doth not intend to take further or other Council in the Cauſe, *i. e.* the Council of an Advocate. What Mr. *Clarke* means by this I well know not, I refer you to his Title, *De Petitione in die aſſignato ad concludendum.*

3. Now

3. Now if in the preſence of the Proctor, or the Principal Party himſelf, the Judge do Aſſign to hear his Sentence in the Cauſe, upon ſuch a day, and in ſuch a place, without bidding the ſaid Party or his Proctor be preſent; yet the Premiſſes being obſerved, (that is the Contumacy of the Adverſe Party being accuſed and he being called) Sentence may be given in Penalty of his Contumacy, if he appears not, as though the ſaid Party or his Proctor had been admoniſhed to be preſent to hear Sentence: For this aſſignation to hear Sentence, being made in preſence of the Adverſe Party hath the ſame force and effect, as if he had been ſo admoniſhed to hear Sentence; yet becauſe an abounding Cautele cannot do harm, and that this diſpute or objection may be removed, it is not amiſs to admoniſh the Proctor of the Adverſe Party, or the Party himſelf, to be preſent to hear Sentence as above. And here it is to be noted that if on the ſaid day ſo Aſſigned to hear Sentence, the Judge being not fully informed doth not pronounce the Sentence, the Party at whoſe Petition the Term to hear Sentence, was ſo Aſſigned, cannot deſire the Judge to Aſſign another day, to hear Sentence in Penalty of the contempt of the Proctor of the ſaid Adverſe Party, or the Party himſelf if they are abſent, becauſe the aforeſaid Party or his Proctor, were not admoniſhed to any other Act or effect than to hear Sentence given in the Cauſe, and therefore they are not contumacious as to any other effect: In this caſe therefore it is convenient that the aforeſaid Proctor, or Party, be admoniſhed to be preſent, not only to hear Sentence, but to ſee all further proceedings, to be done incluſively until Sentence be pronounced in the Cauſe.

4. The Cauſe being now concluded, and all things in readineſs, for Sentence, it is requiſite, that at the time of this concluſion, the Proctors deſire a time may be Aſſigned, to inform the Judge as well in matter of Fact as the Law, on both parts; but this day of information is to be on ſome day on which no Court is kept, and in the Chamber of the Judge or Advocates, [in the Conſiſtory in ſome places] at theſe informations, the Proctors who are feed in the Cauſe, are wont alſo to be preſent that they may be ready to acquaint

quaint the Advocates, what Acts have been done in the Cauſe: For in thoſe things, they are more expert and more converſant than the Advocates, not only becauſe all Acts of Court are drawn by them, but alſo becauſe thoſe Acts are wont to be writ in a Book, kept by them for the ſame purpoſe particularly; though ſometimes in very weighty Cauſes the Advocates are wont to draw the Acts. The order at their informations is this; the Advocate of the Plaintiff, in the preſence of the Advocate of the Defendant, muſt firſt read the Libel to the Judge, who compendiouſly writes down the effects of it: then he reads the anſwer of the Principal Party, to that Libel which the Judge alſo abbreviates. And if the intention of the Plaintiff, is not ſufficiently proved by theſe anſwers, then the Depoſitions of the Witneſſes are to be read. Then the Advocate of the other Party muſt be heard, who muſt alſo read the matter of Defence, and all the proofs on his part. Which being done, the Advocates are wont to inform what Queſtions of Law, ariſe from the matter of Fact, proved on both parts; and if the Advocates cannot agree betwixt themſelves, as to theſe queſtions ſo moved by them, the Judge in that behalf is wont to interpoſe his opinion, and appoint what and which Queſtions of Law they ſhall diſpute upon: And for the diſcuſſing and arguing theſe Queſtions of Law, and alſo the matter of Fact, or the merits of the Cauſe, many days are wont to be Aſſigned, before the Judge is fully ſatisfied in the matter: All which proceedings the Judge is wont to write down in ſhort, for his memory ſake. *Alciatus* † has ſpoken ſo fully, and accurately as to the manner of the Advocates, making their obſervations upon the proofs, their manner of diſputing and alledging, and the office of the Judge, upon ſuch diſputations and Allegations, that I think it not amiſs, to refer the Reader thither; being eſpecially uſeful for the Learned Civilian.

† *De teſt. fol.* 150. *Sect. De Rubric. & de diſput. & Allegatione* 5 *Advocat. à fo.* 160. *ad fo.* 162. *Sect. Officium Jud. Allegationes audientiæ, & Sect. De conſilii requiſitione.*

CHAP.

# CHAP. VI.

## *Of* SENTENCE *in these Plenary Causes*

### SECT. 1.

1. *What it is in general, and how many fold.*
2. *What an Interlocutory Sentence or Decree is, and when it hath the force of a definitive Sentence.*
3. *In what Form the Sentence ought to be drawn, that is, whether and when it ought to specifie a particular and certain thing, and when not.*
4. *The Form, Time and Place of pronouncing Sentence in presence of the Adverse Party and his protestation to appeal.*
5. *The manner of pronouncing Sentence, in penalty of the contempt of the Defendant or his Proctor.*
6. *The manner of offering and pronouncing two Sentences. And the manner of compounding the Charges* *.

* *Quando expensarum mutua fiat compensatio. vide Law. de expens. n.* 12.

THE whole business of Sute being dispatched, in manner as above, and informations, a Conclusion, and Deliberation being had in the matter, it remains that the Parties desire Sentence to be given in the Cause. Now this is said to be the third part of the proceedings and is called *Terminative*, or *Definitive*. The name of Sentence, is usually taken for the opinion, or apprehension, any one hath of a thing. Or oftentimes, in a Court of Judicature, it is taken improperly, for a decision of a matter in controversy; and in this case an Arbitrator may be said to give Sentence, and a Decree may also be said to be a Sentence. But properly a Sentence is taken for a decision (of any thing in controversy) made by the Judge alone; and then the pronunciation or determination of the Arbitrator (which is called an Arbitration, *&c.*) is rather opposite to a Sentence: Therefore

Therefore a Sentence may be ſaid to be twofold, (though *Alciatus* numbers four ſorts of Judicial Sentences) the one interlocutory †, (which is a large acceptation of the word) the other definitive (which is a ſtrict acceptation of it, & κατ' ἐξοχὴν, according to the eminence of it,) being that which terminates, and puts an end to the principal Cauſe.

2. An interlocutory Sentence or Decree, is that which is pronounced betwixt the beginning and ending of the Cauſe; not upon the principal Cauſe, but upon ſome incident or emergent queſtions, (*Scil.*) upon the Libel, its admittance, or amendment, upon any delay that is to be given or denyed, and the like. Now this interlocutory Decree, is ſaid to have the vertue of a definitive Sentence, when it is final, and that there is no hopes of another Sentence, * or other Decree, upon that Article, Thing or Cauſe; but it doth put an end to that thing, about which this interlocutory Speech was ſo made: (To wit a peremtory exception is given, to hinder the proceedings; or I have alledged that the proceedings are retarded, and I have therefore deſired Charges, for the proceedings being ſo retarded; and the Judge hath rejected this Petition. Likewiſe an exception is given in the name of an Excommunicate Perſon, againſt the Certificate, by which he was injuſtly Excommunicate, which objection he proveth, and deſireth his abſolution without contumacy Fees, and his Adverſary to be condemned in Charges: Yet the Judge pronounceth, that the Party hath not proved, but hath failed in the proof of the ſaid objections, or at leaſt (being often requeſted to condemn the Adverſe Party in Charges upon this Article of objection, againſt the ſaid Certificate,) doth expreſly refuſe, or tacitely, by proceeding to other things, contrary to this Petition; as to theſe caſes, or Articles there is no hopes of another Sentence; therefore the ſaid Sentence or interlocutory Decree, hath the force or vertue of a definitive Sentence.

3. *Juſtinian* ſays, that the Judge † ought as much as is poſſible, to pronounce Sentence upon a certain ſum of Money or upon a certain thing, though the matter be tryed before him, for an incertain quantity. From which Text, *Mynſinger* gathers two Opinions the Firſt is, that the

† *Weſemb. tit. ff. de re jud. n. 3. & 4. Bachov. ad Weſemb. de re jud. n. 4. de Hahn. ad Weſemb. ibid. n. 3. Jaſon. in l. nequicquam. Sect. ubi. decretum de officio proconſ. gloſs. in clem. 1. verb. deſinit de ſequeſt. poſ. Rosbach in proceſs. civil tit. 71. n. 8. uſq; 16. Maran. in ſuo ſpecul. in 3. part. 6. part. act. 1 de ſenten. n. 3.*

* *Octo enumerantur Caſus in quibus hæc ſententia Interlocutoria dicitur habere vim ſententiæ definitivæ; de quibus vide Rosbach. in procur. Jud. civil. 71. n. 6 & Lancellot. tit. de ſententia. n. 2. in fine. n. 3. Mynſ. obſerv. cameral. cent. 3. ob. 38. Maranta. p. 6. tit. de ſenten. n. 42. Julius Magenhorſt. in comment. ſuper ord. cameral. part 2. c. 28. Roding. pand. cam. l. 1 tit. 19.*

† *Inſt. de Action. Sect. curare autem per. tot.*

Judge ought to pronounce a certain Sentence'; the other is, that an incertain Petition of the Plaintiff ought to be tolerated. As to the First there is this Rule, *Quòd quivis judex necessitate astringatur, sententiam ferre certam, etiam si actum sit, super quantitate incerta*; and this is intimated by the word (ought) which signifies a necessity: Likewise the word *Omnino*, in the Text, or *Ommimodo*, as some will have it, which is so Intensive, and General, that it comprehends every Cause; nay reason it self requires it so to be: For otherways, Sutes would rather be multiplied, than taken away (by such incertain pronounciations) after so much labour and cost made by the Parties in Sute; but doth not this repugn that common Rule, which says that the Sentence ought to be conformable to the Libel, nor ought it to contain any thing, other than what is desired: For if from an uncertain Action, or Libel, a certain Sentence is pronounced, it necessarily follows, that the Sentence doth differ from the Libel? I answer, that incertain and certain are qualities, which make no difformity, betwixt the Libel and the Sentence. Nor doth the aforesaid Rule alway take place; for there are many species of Facts, in which the Incoherence of the Libel (or Petition) and the Sentence, are permitted. This Rule takes no place in Criminal Causes, in which there needs no conclusion; and if there be a conclusion, yet the Judge hath Power to Condemn (more or less) by his Sentence the Quality of the Crime, and Persons being known †. Likewise the Judge in Civil Causes, (as to the Qualities, the Times, the Manners, the Places,) needs not follow the Petition of the Libel. For what if a Condemnation being desired, and it appear by the Acts, that a Condemnation ought not to be made, and therefore the Judge absolves the Defendant? Now in this the Sentence differs from the Libel, only as to the Qualities of Condemning or absolving: Wherefore *Baldus* very Elegantly saith that it is sufficient, if the Sentence * agree with the Libel, in the Thing, the Cause, and the Action; (*Scil.*) First in the thing asked in the Libel: That the Judge do not pronounce Sentence upon any other thing than that thing so asked in the Libel. Then in the Cause of asking; that the Judge do not pretend any other Cause; as if the Plaintiff

† *Bart. in l. quid ergo. 13. Sect. poena gravior. ff. de his quæ not. a. inf. obs. Mynsi. Cam. cent. 4. obs. 81.*

* *Hisce consentiunt quæ a Lanfr. dicuntur de interloc. & appell. n. 16.*

tiff do deſire what he ſueth for, upon the account, or for the Cauſe of a Loan, and the Judge purſuant to that Cauſe, doth ſo pronounce the Sentence. Alſo in the Action; that the Judge follow the Action Inſtituted by the Plaintiff, either by Condemning or abſolving. Yea the Judge may modifie the Libel, though it be not deſired. Alſo if in the beginning the Plaintiff ask a leſſer quantity, and then in the progreſs of the Cauſe he prove a greater; yet nevertheleſs the Sentence ſhall avail, though it contain a greater quantity than the Libel: For the Judge ought to follow the verity of the proof which probably, at the beginning of the Suit, neither he nor the Plaintiff knew. Alſo if the Plaintiff ask Five, and the Defendant confeſſeth that he owes Ten, the Judge may, yea he ought to Condemn the Defendant in Ten: For this diſagreeing of the Libel (or Petition) and the Sentence, is tolerated by the confeſſion of the Defendant who is convened. And Laſtly, Sentence may be pronounced upon things that are not requeſted in the Libel; ſo as the ſaid things, be of the nature of thoſe things which are asked, or correlatives, or correſpondents with them, or are otherways emanant or proceeding from the ſame Fountain. *v.g.* You deſire in your Libel or Declaration, Five marks of Silver, and the Judge pronounceth Sentence for Three Pounds Six Shillings Eight Pence; in this caſe the Sentence is valid; becauſe Three Pounds Six Shillings Eight Pence, is the ſame Sum in our account, with Five marks: Another example is, If my Neighbour ſues me for the priviledge of Watering his Cattel at my Pond, or Pit, the Judge by the Sentence, orders me to ſhut up my Pond, in this he pronounceth Sentence, that my Neighbour ought to be denyed the priviledge of Watering at it. And this is it which the Practitioners uſually ſay; that though the Sentence doth not comprehend the thing deſired, yet it comprehends thoſe things, which are of the ſame nature with thoſe things asked or ſued for in the Libel. Therefore we ſee in theſe caſes, the Sentence doth ſupply the deformity of the Libel. By the like reaſon alſo it oftentimes happens that an incertain Sentence is admitted. As Firſt, if the Judge in the Sentence, refer himſelf to ſomewhat from whence the certitude of the Sentence may be gathered; example: I Condemn to pay the Debt, accor-

ding to the obligatory caution, produced in Court or in the Acts of Court; which is as much as if the Judge ſhould ſay, pay what thou oweſt: So as this Debt do appear by the Probatory Acts; ſuch as are the Witneſſes, the Inſtruments, the Confeſſions, *&c.* but it is otherways, if the Debt appear only by the aſſertory Acts, (to wit) becauſe the Plaintiff affirms in his Libel, or Poſitions, that ſuch a Debt is due to him, but doth not prove it. So in a Cauſe of damage, an incertain Sentence, and Condemnation is admitted on this manner: I Condemn *Mævius*, to pay to *Titus* Ten Nobles or to owe damage, *&c.* beſides, in the Petition of an Inheritance, [or Perſonal Eſtate] an incertain Sentence doth avail; for the Judge may pronounce, that all ought to be reſtored, whatſoever belongs to that Eſtate, and is in the cuſtody of the poſſeſſor: Which is true, if it be a Univerſal Action: For as an incertain, ſo alſo an incertain Sentence is tolerated: For as if this Action were Inſtituted for a certain thing, it is ſo to be declared, and to be concluded in order to the reſtitution of it: And ſo it is meet there be a certain pronounciation. Laſtly he who hath promiſed a horſe or a garment alternatively, is to be ſo Condemned, that he pay either of them. To theſe add other things of the like nature. Now *Mynſinger* comes to the other opinion, which reſpects the Petition of the Plaintiff, in which caſe, this Rule is to be obſerved; that the Libel of the Plaintiff, ought not to be admitted, unleſs it compriſe a certain Petition. Which diſcourſe is partly hinted at, in the Firſt Chapter of this part, touching the altering or amending of Libels, and thither we refer the reſt; only we ſhall abbreviate what *Mynſinger* here ſays, by way of limitation to the aforeſaid Rule: Firſt he ſays, that a general and incertain Petition, is tolerated, in Univerſal, and general Actions, without ſpecifying the things, for it is convenient that we underſtand, that ſome Actions are Univerſal, others General, and very many Singular or Special. We call them Univerſal, when we Sue for ſome Body of the Law, containing many things, with increaſe and diminution, ſuch as are an Inheritance, a Juriſdiction, a Dowry, a Reward, *&c.* therefore an Action for an Inheritance, (or Perſonal Eſtate) a Dowry, and a Reward, for

for any ones Labour, *&c.* are Univerſal Actions. General Actions are ſaid to be thoſe, which appertain to that thing which is General, comprehending diverſe ſpecies of things, and ſo conſequently the whole negotiations: Of which ſort are the Tutorſhip or Office of a Tutor, which not only reſpects one ſpecies of that Office, but in general, the whole management of the Pupils Patrimony: So alſo Society, Stewardſhip and the like. Therefore an Action againſt a Tutor for his Tutorſhip, againſt a fellow Tradeſ-man, or Merchant, *&c.* againſt a Steward, or others intruſted to manage any mans buſineſs, are general Actions. Singular or Special Actions are thoſe, whereby we are ſaid to proſecute that which of its own nature, (and ſo far as appertains to the Interpretation of the Law) is ſpecial, though it may have ſome acceſſaries; and of this ſort are a horſe, a garment, a houſe, and ſuch like things: Therefore an Action about a Mandate, or Letter of Attorney, a thing Lent, Pawned, and the like, are ſpecial Actions. Secondly the incertainty of the Libel is permitted, if the incertitude happen by the Fact of the Adverſary, as is in an alternative obligation, where the Election or Choice, belongs to the Debtor. Thirdly if the incertitude of the Libel, happen by reaſon of the thing deſired, as when it is Sued for ſome Fact, when the Facts are incertain. Fourthly the incertitude of the Libel is permitted, if any thing that is acceſſary is ſued for, to wit, Profits or Charges, as when I Sue for ſuch Land, with the Profits, *&c.* Fifthly a general and incertain Libel is tolerated, ſo far as the matter reſpects the breaking of a Preſcription. Sixthly a general and incertain Libel concludes, if the proofs made in the proceedings, are certain, and ſpecific. Laſtly the aforeſaid Rule is true, if the Adverſary do oppoſe the incertitude of the Libel or Declaration; but if he doth not ſo oppoſe it, the Libel takes place, though it be ſo incertain †. But theſe exceptions to the aforeſaid Rule, are to be underſtood as to Civil Cauſes only; for in Criminal Cauſes an obſcure or general Libel, is of no effect. Thus from what *Mynſinger* ſays, touching the incertainty of the Libel, we may in the like caſes infer the incertainty of the Sentence may take place.

*Singular Actions.*

† *Gail. pract. obſer. lib.* 1. *ob.* 62. *n.* 11.

4. The Proctor who hopes to obtain * Sentence in the Cauſe, muſt get it drawn in writing, againſt the day which is Aſſigned for Sentence, and muſt give it to the Judge ſaying, I deſire Sentence may be given, and that Juſtice may be done on my part, but in the Courts of the Arches, it hath been long obſerved, that the writer of the Acts of Court, (by the Inſtructions given him, from the Advocates or Proctors) are wont to draw the Sentences; and the Sentence being given the Judge, if he intends to pronounce the ſame, muſt Read it until he come at theſe words [but the part of *N. viz.* the Party againſt whom he is to pronounce the Sentence] and then he is wont to ask the ſaid Party, what he will ſay or ask, who is commonly wont to Reply, I deſire that Juſtice may be done. Which word Juſtice (if it ſhould chance to be diſputable, about the Sentence pronounced, (*viz.*) whether the Judge pronounced this or ſome other) the Judge is wont (with his own hand) to inſert into the Sentence, that ſo by finding that word, *ſo*, of his own hand writing, he may eaſily decide the controverſy; for in every Sentence, to be pronounced, a place or ſpace, is uſually left, for the inſerting of that word: Which being ſo inſerted into the Sentence, the Judge then proceeds to Read the Sentence forward: Which being Read, he for whom the ſame is ſo pronounced, returns the Judge a grateful acknowledgment for his Juſtice, and then he requires the Notary publick, that is the writer of the Acts, to draw up a publick Inſtrument, upon the pronounciation of this Sentence, and that the Witneſſes there preſent, may give their Teſtimony upon it; and the Notary ought (in the Act which is drawn upon the prolation of this Sentence) to inſert the Names, and Surnames of the Witneſſes who are preſent, at the time of pronouncing the ſame. But the Party againſt whom Sentence is given, if he doth not intend to appeal judicially, or at the Acts of Court, may afterward, before a Notary, ſay in writing I diſſent from the prolation of this Sentence, and I proteſt as to the Nullity of it, and of a grievance; and of appealing from the ſame, within the time allowed by the Law; of which appeals, is ſpoken fully afterward.

5. Concluſion being made in the Cauſe, and informati-

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* *De forma judicandi. vide Weſemb. ff. de re judicata. n. 7. Alciat. de Sent. per tot. Plura reperias obſervatu digna in Scriptis ferend. cſt. Lan. de interlic. & appel. n. 8. qua forma. n. 9. 12. ubi ferend. 17. coram quo. n. 18, 19, 20.*

ons given to the Judge, as is aforeſaid, as well in matter of Fact, as matter of Law, and the Judge intending to determine the Sute by Sentence hath Aſſigned a certain day, to hear the ſame, let the Proctor who hopes to obtain Sentence, take care that the Adverſe Party or his Proctor †, be admoniſhed to be preſent to hear Sentence, in the Cauſe. And if on that day, ſo Aſſigned for Sentence, neither the Party nor his Proctor do appear, the Proctor who deſires the Sentence, muſt accuſe the contumacy of *N.* the Proctor of the Adverſe Party, and of the Party himſelf, (if he and not his Proctor was) admoniſhed to be preſent upon this day, and in this place, to hear Sentence given in the Cauſe, and to ſee Juſtice done, but taking no care to be preſent, wherefore he muſt deſire, that they may be reputed contumacious, and that (in Penalty of this contempt) Sentence may be given, and Juſtice may be done. Then the Judge cauſeth the Party and his Proctor who were admoniſhed (as before) to be preſent, to be called three times, with a loud Voice, and if neither of them appear, he muſt pronounce them contumacious, and in Penalty of this contempt, he Decrees that they ſhall proceed, to the pronouncing of Sentence: Then the Proctor who deſires this Sentence, muſt take care that the ſame be Writ or Corrected in the *exordium* of it, on this manner, (*viz.*) the Party of the ſaid *N.* (that is the Party who deſires this Sentence) being preſent before us, here in Court by his Proctor; but the Party of the ſaid *M.* (that is the Party abſenting himſelf,) being contumaciouſly abſent; (whoſe abſence is ſupplied, by the preſence of God whom we Religiouſly invoke) the Party of the ſaid *N.* deſiring Sentence may be given, and that Juſtice may be done on his part; All and every of the proceedings therefore, being Firſt Searched, Weighed, and Examined, *&c.* and ſo on, as in the uſual form of Sentences.

† *Alciat ubi ſupra, Sect. conditiones ſententiæ, ſive qualiter ſit ferenda. n. 2, 3. & Wemb. ubi ſupra. n. 7.*

6. If it is appealed from grievances (that are made before the pronouncing of Sentence,) and afterwards from the definitive Sentence, and the ſeveral Appeals, are contained in one and the ſame Inhibition, and are accumulated in one and the ſame Libel if the Party appealing do make default, in the proof of his Libel, as to the grievan-

† *Succumbens in aliqua appel. ejt condemnand. in expenſ. Alciat de expenſis fol. 194. Sect. de exp. in cauſis app. factis.*

ces Libellate, and hath juſtified his appeal †, as to the principal Cauſe, that is, if he hath proved that the Sentence pronounced by the Judge from whom it is appealed, was injuſt, or null, or contrariwiſe. The Judge in theſe caſes, is wont to give two Sentences, the one for the Party appealing, and the other for the Party appealed: But in caſe becauſe the Party appealing hath proved the Libel on his part, and not in the whole buſineſs, he ſhall not obtain Charges of appeal, but a compoſition of Charges is to be made; that is becauſe he hath appealed frivolouſly and unjuſtly, either as to the grievances, or as to the Sentence, and ſeeing the Party appealed hath obtained Sentence on his part, as to the one, or the other of the appeals, he ought alſo to obtain his Charges, as to this appeal: Therefore a compoſition of the Charges, is to be made as above. But admit that the Party appealing, doth exact more or greater Charges, in his Appeal from grievances, than the Party appellate doth prove he hath been at, in juſtifying or confirming the Sentence of the Judge, from whom it is appealed, as to the juſtneſs of the Cauſe: As for example, the Party appealing from comminatory, or threatning words, (that is, when the Judge, from whom it is appealed, doth threaten the Party, that he will give Sentence againſt him, which words do appear in the proceedings of the Judge (from whom it is appealed) which are made to the Judge, to whom it is appealed) he ought to prove theſe words, or otherways, he ſhall loſe his Cauſe. Likewiſe the Party appealing in a Cauſe of Correction, if the inferior Judge do grieve any man, before the Sentence is pronounced, or by his Sentence, or Perchance after Sentence, the Party grieved in this caſe, (though he might interpoſe his appeal, as to the Judge alone, and might proſecute the ſame, as to him, yet out of the reverence due to the Judge in the appeal) he may ſay, that the grieveances, from which it was appealed, were laid at the Petition, the Inſtance, the Promotion, or Inſtigation of ſome other Perſon, not named in the Acts of the Judge, from whom it is ſo appealed) and this appeal is to be Proſecuted, as to this Perſon, and not as to the Judge; and the ſaid Party appealing ought to prove by Witneſſes, that theſe grievances,

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were inflicted upon him, at the Inſtance, Petition, Promotion or Inſtigation, of the ſaid Party appellate, or otherways, he will loſe his cauſe of Appeal. Likewiſe if it be appealed from too great and exceſſive a Taxation of Charges if this exceſs doth not appear by the proceedings themſelves, being tranſmitted, as often falls out eſpecially, when the exceſſive Charges, (as well for Solliciting the Cauſe, as for diſpatch of the Commiſſion in remote parts, for Examination of the Witneſſes) are asked, the Party appealing is obliged to prove by Witneſſes, that theſe Charges are exceſſive; in all theſe caſes, the Party appellate, if he obtains Sentence for himſelf in a Cauſe of grievance, he ſhall obtain, as well his ordinary Charges, made in proſecuting this appeal, as alſo the other Charges, made in proving the aforeſaid grievances, by Witneſſes upon the like reaſon alſo, if the Party appealing, do (by new proofs, known to the Party appellate) obtain in this appeal, from a definitive Sentence, and is caſt in a Cauſe of grievance, he ſhall obtain his Charges of appeal. But it is otherways, if the other Party was ignorant of thoſe proofs; for in that Caſe for his Malice in not producing thoſe Witneſſes in the Firſt Inſtance, † he is to be Condemned in Charges, yet the Party appellate ſhall obtain ſome Charges, to wit, thoſe which he expended, by reaſon of the Sentence which was given on his part, (*viz.*) for the Fee of the Sentence, and the Execution thereof, and the Fees of the Advocates and Proctors, for giving informations, and diſpatching Acts in and about the ſaid Sentence, which the Party appellate obtained. This Mr. *Clark* ſaith he has known adjudged, in the appellant, and the appellate, through evil repute; for he who produced not his Witneſſes in the Firſt Inſtance, is of ill repute, and not to be excuſed from Malice; and he who knew that his Adverſary had Witneſſes to prove his intention, and yet obtained Sentence, is not to be excuſed of Malice, *&c.* when a Sentence is nulled, *&c.* or retracted. See *Alciat* *.

† *Hæ expenſæ inter eas numerari poſſunt quæ veniunt ratione contumaciæ. De quibus vide Lanf. expenſ. a numero 22. ad finem. c. quoniam.*

* *Ubi ſupra ad finem ejuſd. tit. de ſent. & Weſemb. ubi s. n. 8.*

SECT.

## SECT. 2.

## The putting this Sentence in EXECUTION or the claiming the thing adjudged.

1. *How* Res judicata, *or the thing adjudged, doth differ from a Sentence, and when it is said so to be.*
2. *After how long time ( from the pronouncing the Sentence,) it ought to be demanded to Execution.*
3. *The Form of the Proctors Exhibiting his Proxy after fifteen days are elapsed, from the time of pronouncing the said Sentence, and his Petition to have the same put in Execution, and to have a Citation Decreed in order thereto.*
4. *How put in Execution upon the return of this Citation, and how the Charges are Taxed, ( if the Party pretending an appeal is absent ) and how a monition is granted for them.*
5. *How put in Execution, if the said Party is present. And faileth to prove that he hath appealed.*
6. *The Manner of making manifest, and apparent, the thing adjudged, when the Sentence is demanded to Execution. And how the Party ( adjudged to pay the matter contained in the Sentence ) must be proceeded against ; if he refuseth.*

RES *judicata*, or the thing adjudged, is said to be that, which is determined by the Sentence ; the Sentence adjudgeth, and puts an end to the matter, but the *Res judicata*, or the thing adjudged, is the effect of it, and possesseth that determination or Sentence may be appealed from, and retains its name, so long as the time is in being which is allowed for Appeals ; but that time being elapsed, it receives the name of *res judicata*, or a matter fully adjudged, and cannot be appealed from. Now the Sentence may have its effects upon the thing adjudged many ways, as. 1. If it be not appealed from it, within

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a Lawful time. 2. If the Appeal be not brought into Court. 3. If it be not † proſecuted therefore the Sentence is then ſaid to paſs, or have its effects upon the thing adjudged, when the time of provocation or appealing from it is elapſed, ſo that the right of the Sentence cannot be any more controverted.

† *Plura de his videas apud manual. Jur. de verb. ſig. a Sebaſt. Almer. verbum ſententia. Sect. 3. Weſemb. parat. ff. de re judicat. n. 3. Modeſtinus ff. l. 1. de re jud. Chriſtoph. Brecht. in proc. judic. c. 14. in prax. etiam quæ ſit, eleganter traditur a Mynſ. Inſt. de excep. Sect. de re jud. Item ſi. n. 1.*

2. The time which the Law limits for putting this Sentence in Execution, is at this day fifteen days from the time of pronouncing the ſame; though formerly four Months were allowed: By the Law of the Twelve Tables thirty days was allowed; as *Gellius* obſerves in his twentieth Book at the firſt Chapter *.

* *Quando ſenten. dicatur tranſire in rem. Mynſ. ib. n. 2. Weſemb. ubi ſ. n. 9. Gail. 1. pract. obſ. 139. per tot Mynſ. obſ. Cam. 2. ob. 2, 3. 11. etiam. Gail. ibid. ob. 135. n. 10. Cujacius in ff. l. 1. c. 39. leg. 2. & leg. debitoribus. 31. cum ibi not. de re jud.*

3. If the Party who (at the time of giving Sentence) did pretend, and proteſt to appeal, takes no care to inhibit the Judge from whom he pretends to Appeal, within the time Aſſigned for the proſecution, and the certifying the proſecution thereof; or if in caſe it be not appealed at all judicially, or in Court: If fifteen days are elapſed from the time of pronouncing the Sentence, the Party who obtained the Sentence, muſt go to the Judge, who pronounced the ſame, and muſt again Exhibit before him, his Proxy for *M.* and make his Party for the ſame, and deſire that *N.* (that is the Party againſt whom the Sentence is given) may be called by a Citation, againſt ſuch a day, to ſhew cauſe why the Sentence, already given againſt him may not be put in Execution, and the Charges Taxed * which Petition the Judge Decrees, appointing the Party (who pretends an appeal,) a day for his appearance, according to the diſtance of his habitation.

* *Nunquid in tax. expenſ. debet citari adverſarius Lanf. de expenſ. n. 8. & an ſit citand. in executione. ibid. de. appel. n. 40, 41.*

4. Upon the day, ſo appointed † for the ſaid Parties appearance, the Proctor who obtained the Citation, muſt Exhibit the ſame, with a Certificate indorſed upon it; and muſt accuſe the contumacy of O. who was cited to ſhew cauſe, why the Sentence already pronounced againſt him, may not be put

† *Quomodo autem facienda ſit executio ab Ulpiano pulcherrimè oſtenditur ff. in lege à Divo. pio. 15. de re jud. Schurff. conſil. 19. cent. 1 Alciat. de ſenten. exec. Sect. qualiter & quo jure.*

put in Execution; and why the Charges of Sute, expended on his part, in this Cauſe, might not be Taxed. Wherefore the ſaid Party not appearing, nor alledging any reaſon, why the ſaid Sentence may not be put in Execution, he muſt deſire that he may be reputed contumacious, and in penalty of ſuch his contempt, that the ſaid Sentence, ſo already pronounced, may be put in Execution, and the ſaid Charges Taxed; then the Judge (the ſaid Party ſo pretending an appeal, being called three times, and not appearing) doth pronounce him contumacious, and in penalty of ſuch his contempt, doth commit the Sentence to Execution; and then the Party obtaining the ſame doth give the Judge, a ſchedule of Charges of the whole Sute, and in penalty of the aforeſaid Party, ſo Cited, called and reputed as contumacious, and not appearing, he muſt deſire the ſaid Charges to be Taxed. And then the Judge doth Pronounce and Decree, as is requeſted, and at the bottom or end of the ſchedule given him to Tax, he muſt write We, Tax *N.* to pay † ſuch a ſum, and then he muſt put his hand to it. Then the Party himſelf, or his Proctor, muſt Swear to this Taxation, (*viz.*) that they have expended, or are like to expend neceſſarily, * the ſum Taxed; and though it is commonly uſed, that the Party who deſires this Taxation of Charges, do Swear that he hath expended, and is like to expend the ſame, yet *quære*, whether the Party, ought only to Swear as to thoſe things which are expended, and not thoſe Charges he is likely to expend, further in the matter. Then a monition is requeſted, to admoniſh the Adverſe Party to pay theſe Charges, and the thing or principal lot, or matter adjudged by the Sentence, againſt ſuch a day, or elſe that he appear Perſonally before the Judge, upon ſome Court day, to ſee himſelf Excommunicate for his contempt, in not paying the principal lot, or matter adjudged, and the Charges aforeſaid. Which Petition the Judge granteth, appointing a day for the payment, or compoſition of the matter aforeſaid; but obſerve that this monition, to pay the principal lot, or matter adjudged, is to be requeſted in a cauſe of appeal, when the Judge of that appeal, hath pronounced for his own Juriſdiction, and hath proceeded in the princi-

† *An Actor poſſit petere expenſas reficiz affirmativè reſpondit Lan. de expen. n. 21. & ibi ab eo tractatur quæ ſunt expenſæ in quibus victus debet condemnari. n. 18.*

* *In expenſar. taxatione tria debent concurrere per ordinem. Lanf. ubi ſup. n. 7. & in n. 18. Sect. attendite etiam quod judex ſolùm habet taxare expenſas factas, non autem faciendas. Alciat. in prax. de expenſis f. 194. Sect. quando & qualiter.*

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pal Cauſe; for if otherways, his Sentence were a confirmation of the firſt Sentence, and that the Cauſe is remitted back to the Judge, from whom it is appealed; then the ſaid Judge, who determined the appeal, is not Judge as to the Principal lot, or matter Sued for, and therefore cannot grant a Monition, to pay more than the Charges aforeſaid. Likewiſe obſerve that upon ſome good motives, the Judge may appoint ſeveral days, for the payment, as well of the thing adjudged, as of the Charges.

5. If the Party, againſt whom the Sentence was pronounced, and who pretends an appeal, do not appeal at the time of pronouncing the Sentence aforeſaid, but doth appeal in writing, before a Notary and Witneſſes out of Court, and being called as aforeſaid, (to ſhew cauſe why Sentence ought not to be put in Execution) doth appear, either by his Proctor or Perſonally; the Party who obtained the Sentence, muſt ſay that he doth in the preſence of the ſaid Party, *&c.* deſire that the Sentence already pronounced, may be put in Execution, and that the Charges may be Taxed. Then the Party appealing, if he intends to proſecute his Appeal, muſt ſay that (under the proteſtation of not conſenting, *&c.* as afterwards in appeals) he doth Exhibit his Proxy for *N.* and make his part for the ſame. And muſt alledge, that under thoſe previous proteſtations, the Sentence already pronounced, ought not to be put in Execution, in as much, as it hath been and is, (on the part of his Client,) Appealed (in due time and place,) from the ſaid Sentence; and that as yet, the *primum fatale*, doth depend, that is, a year is not elapſed, from the time of pronouncing the ſame, or rather, from the time of interpoſing the Appeal: And then, if the Party who obtained this Sentence doth believe that the Party Appealing did interpoſe his Appeal in due time, before a Notary and Witneſſes, he may deſire the Judge to appoint and prefix a time, to proſecute and certify this Appeal: And then that time, or times, ſo appointed, for proſecution, being elapſed, if in the mean time, the Judge is not Inhibited, the Party who obtained the Sentence, may (in the preſence of the Proctor, who pretends this Appeal,) deſire that the Sentence may be put in Execution, without any

any other or further Citation or Monition, to that purpoſe; becauſe the ſaid Proctor pretending an appeal, hath Exhibited his Proxy, for his Client, ſince the Sentence was pronounced, and hath alledged an Appeal: Then the Judge, ought to commit this Sentence to Execution. But it is here to be noted, that if the Party pretending an appeal, hath ſo appealed, in due time and place, and hath obtained an inhibition (for he who obtaineth an inhibition, is ſaid to proſecute the Cauſe) from the Judge, to whom he appealeth, within the Term appointed for the proſecution of it; though he doth not ſatisfie the Judge (from whom he appeals) of the proſecution thereof, neither upon the day Aſſigned for that purpoſe, nor upon the day, Aſſigned to certify touching the ſame, nor before: And though (as above) the days of proſecution and certifying, are elapſed; and though the ſaid Judge from whom it is appealed, do (in the preſence of the Proctor of the Party appealing, who alledgeth no Cauſe, or in penalty of the contempt of the principal Party, who was Cited to ſhew Cauſe, why the ſaid Sentence, ought not to be put in Execution) commit this Sentence to Execution; yet notwithſtanding this Execution, the Party appealing may proſecute his appeal, and if it be juſt, he ſhall obtain it, notwithſtanding that the ſaid Sentence were committed to Execution: Yet the ſaid Proctor (or the Party himſelf, if the Premiſſes were done in preſence,) ought to diſſent from all things, being ſo done by the Judge, and ought to proteſt as to the Nullity of them; Mr. *Clarke* ſays, that this Queſtion, (*viz.* whether or no, this committing the Sentence to Execution, hinder the Party appealing, though ſix and twenty years are elapſed, before he proſecute his Appeal) was very much controverted amongſt the Learned Advocates, but it was adjudged for the Party appealing. But if the Proctor who obtains the Sentence, do believe, that the Proctor againſt whom it is pronounced, hath not appealed within fifteen days, after the ſame was ſo propounded, he may deſire the Judge to Aſſign a time, againſt the next Court day, to prove that it is ſo appealed: Becauſe this Allegation may be proved, by the ſole Exhibition of the publick Inſtrument, made upon the Reading

ing of this appeal before a Notary Publick. And if within the Term ſo Aſſigned to prove this appeal, the Party do inform the Judge, that it is appealed, the Judge may ( at his requeſt ) Aſſign the ſaid Party appealing, one or more Terms, to Proſecute, and Certify as above, which if he do not prove, then the Sentence is committed to Execution. But here obſerve, that ſometimes it is appealed by the Proctor in the firſt inſtance, in remote parts or elſe it happens that ſometimes the Notary Publick in whoſe preſence it was appealed, doth dwell far of; therefore in theſe caſes, a competent Term is to be given to the Party appealing, to prove that it was appealed in a due time, and place: For the Proctors in the ſecond inſtance, of Appeal, have not always theſe appeals in readineſs, but they remain in the Cuſtody of the Proctors of the firſt Inſtance, or rather in the Cuſtody of the Notaries, before whom the Appeal was Read and Interpoſed.

6. Now if in a Cauſe of Legacy, I have proved that ſuch a Legacy is due *in ſpiece*, ( *viz.* ) ſuch Houſhold Goods, Golden Veſſels, Golden Chain, or the like were left me, and the Executor hath withheld the ſame; and that I have obtained Sentence againſt the ſaid Executor, to compel him to pay the ſame, or the true value thereof, but have not proved what the value of ſuch Legacy was. Or if in a Cauſe of Tithes, I have proved that there were ſuch Tithes due to me, but have made default in proving the value of them. Likewiſe in Cauſes where Iſſue for procurations or yearly Penſions, if I have proved that they were due to me, but have omitted to prove their value, Sentence is to be pronounced on my behalf, that the Premiſſes are due, and are with-held, and the Defendant is to be condemned in them, and in Charges. And the Plaintiff ( in every the aforeſaid caſe, before he requeſt the Sentence to be put in Execution, as to the principal lot or thing adjudged ) ought to call the Defendant, to ſee the matters adjudged in the Sentence, made manifeſt and apparent; and alſo he muſt deſire that Witneſſes may be produced thereupon, and may be Sworn and Examined as to the value of the things adjudged. And if the Plaintiff prove the clearneſs of the ſaid matters, or that they are apparent, what things he

he claimeth by that Sentence, then in the preſence of the Defendant or his Proctor, he muſt deſire that the Sentence may be put in Execution, and the Defendant is to be compelled to pay the value of the thing, or matter adjudged, by the aforeſaid Sentence, as in other ordinary Cauſes; but if the Premiſſes, (as to the aforeſaid making apparent the things adjudged,) were done in penalty of the contempt of the Defendant, then before any Execution be of the ſaid Sentence, as to the clearneſs of the matter, the Defendant ought again (at leaſt it is moſt ſafe) to be Cited to ſhew Cauſe, why the Sentence already pronounced, as to the apparent value of the things adjudged, ought not to be put in Execution, and the ſaid Party admoniſhed, to pay the ſum or value, thus made apparent. The reaſon of this is, becauſe the Defendant, may appeal from this Liquidation, or manner of making the matter adjudged apparent, if the Judge exceed due Meaſure, or Moderation. And obſerve, that in that caſe, of making the matter adjudged apparent, if the Defendant do appear, he may except againſt the Witneſſes, produced to prove the ſame, and may uſe any defence, which he might of right have uſed, if the ſaid Liquidation, or proof of the value, had been made before the Cauſe was concluded. But this limitation is yet further to be made herein, that if the Plaintiff has already alledged the value of the Premiſſes in his Libel, and hath produced Witneſſes thereupon, and got their Depoſitions publiſhed; then this publication, doth ſo prohibit, and obſtruct the ſaid Party, that he cannot produce new Witneſſes, upon this matter, or value. To conclude, if the Party againſt whom the Sentence is given, doth not pay the thing adjudged, (if it be in his Cuſtody) and according to the tenor of the Monition to that effect, above mentioned, then the ſaid Party is to be Excommunicate, ſignified and, Impriſoned, as above, in the Second Part of this Book, touching Excommunications. Thus we have gone through the whole proceedings, in plenary Cauſes, from the Firſt Foundation, to the Exit, or final Determination and Authority, the Eccleſiaſtical Courts can pretend to have in the ſame.

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# THE PRACTICE OF THE Eccleſiaſtical Courts.

## *THE FOURTH PART.*

*The Whole Order and Manner of proceeding in Summary Cauſes from the firſt Inſtituting until the Determination thereof.*

### CHAP. I.

### SECT. 1.

1. *What this proceeding is, and when ſaid to be ſuch.*
2. *The order of Obtaining, Executing Certifying and bringing in Citations in theſe Cauſes.*

IN the beginning of the Second Part of this Book as alſo in the Firſt Part, you heard that there were two ways of proceeding in Cauſes, in theſe Courts; the one Plenary the other Summary; according to which form of proceedings, the Cauſes were alſo divided into

Plenary and Summary, the former of which has been even now ſpoke of, and fully defined. Now this Summary proceeding, is ſaid to be that in which no reaſon of order is kept, but rather all order is deſerted, the Truth of the Fact, being only inſpected: † Or it is proceeded *de plano, ſine ſtrepitu, & figura judicii:* To wit, according to the form of the Letters. And this Summary proceeding is divided into *Extraordinarium, Momentaneum, Summatiſſimum.* What theſe are, and what priviledges this Summary proceeding acquires to it ſelf, the aforeſaid Authors have declared; eſpecially *Lanfrance*, and *Alciatus*, who are very copious, herein, in the places afore quoted.

† *Gail. pract. ob. lib. 1. O. 7. n. 5. Myns. Inſt. de ſucceſs. ſubla-tis. in text. e-rant, n. 4. Lan. c. quoniam, n. 12. & in c. ſæpe, per to-tum c. Alciat. prax. d. ſumma-ria cognitionc, Sect. qualiter fiat, fol. 37. Bartol. in ex-travagan. ad re-primend. verb. ſummariè, & verb. de plano.*

2. It is needleſs to repeat again the order of Obtaining, Executing, Certifying, and bringing Citations into Court, ſeeing that is already done, in the Second Part of this Book, and ſeeing the ſame order as to that, is alike obſerved in all Cauſes.

## SECT. 2.

### The Manner of giving in the Libel in this proceeding, getting the Perſonal anſwer, Producing, Swearing, Examining and Publiſhing the Witneſſes.

1. *How the Libel is offered and admitted in this proceeding, and how diſſented from by the Adverſe Party.*
2. *How the Perſonal anſwer, and the Witneſſes are requeſted, and taken,* &c. *and publiſhed; and how exceptions alſo may then be given as before.*
3. *The manner of getting the firſt aſſignation to hear Sentence in theſe Cauſes.*

THE Plaintiff (that is, his Proctor) muſt give in the Libel, and deſire that it may be proceeded Summarily, *& de plano*; which Petition, the Judge Decrees: The Defendant Replies, that he diſſents from the Premiſſes; and

and this diſſenting is ſufficient in theſe Cauſes without conteſting Sute † and denying the Libel, *&c.* as in the Plenary Cauſes. Then the Plaintiff deſires, that the ſaid Libel may be repeated in full force of the poſitions and Articles; which the Judge may ſo repeat, with a *Salvo Jure impertinentium, & non admittendorum.* Then the Plaintiff deſires that the Proctor of the Defendant, may anſwer to the ſaid Libel; who anſwers no other ways than that he doth not believe the poſitions to be true.

† *Lanf. ubi ſup. pra. c. ſæpe, n.* 32.

2. Then a Citation is requeſted for the principal Party, to appear before either the Judge, or Commiſſioners, and the ſaid Citation is to be brought into Court, the anſwer to be taken, and all things to be done, like as is ſhewen in the Fourth Chapter of the foregoing part. The Witneſſes are alſo to be Cited, Produced, Sworn, Examined, Publiſhed and Excepted againſt, in all things, if occaſion be, as is at large Specified, in the Chapter foregoing.

3. Now the proofs being publiſhed, the Proctor of the Plaintiff, or he who hopes for Victory in the Cauſe, deſires the Judge to Aſſign a time to hear Sentence, if the matters propounded, or to be propounded, obſtruct not. And this is called the firſt Aſſignation to hear Sentence, and enjoys the like priviledges in theſe Cauſes, as the Term Aſſigned to propound all Acts, in Plenary Cauſes.

## CHAP. II.

### *Of* SENTENCE *in these Summary Causes, and the matters preparatory thereto.*

### SECT. 1.

1. *Witnesses may be produced, on the day which was Assigned for Sentence, as above.*
2. *How and when it is said to be concluded in these Causes.*
3. *Informations, and Sentence must be given as in the Plenary Causes.*
4. *How the Sentence must be drawn, and pronounced in Plenary Causes, as well as in these Summary Causes, if the Defendant is Dead after the Sute is Contested.*
5. *The Sentence to be requested and put in Execution in like manner as before.*
6. *The Proctors Petition, against the Executor or Administrators of the Deceased, in order to call them to shew Cause why the Sentence pronounced in these Causes, may not be put in Execution.*

UPon this First Assignation to hear Sentence, (if the things propounded obstruct not) in these Summary Causes, the Plaintiff or the Defendant, if they have any necessary Witnesses, present in Court, and do Swear that they are necessary, on their behalfs, the Judge may Admit, Swear, and Examine them, and they may be objected against or rejected in the very same manner as when the Witnesses are produced, on the day Assigned to propound all Acts &c. in Plenary Causes, to which we refer you, having spoken before.

2. On this day thus Assigned for Sentence, he at whose Petition it was so Assigned, must desire again that it may be Assigned, *ad audiendum Sententiam simpliciter*, or that the next

next Court day, may be again Aſſigned, to hear Sentence abſolutely. And the Adverſe Party may either diſſent, or keep ſilent, at the premiſſes. And if neither party (before this Second Aſſignation to hear Sentence is made) do give in any matter, Allegation or exceptions againſt the Witneſſes; then this Second Aſſignation, induceth a concluſion in the Cauſe. And note as above that if on the ſaid day, ſo Aſſigned to hear Sentence, nothing is done, then it is ſaid to be concluded in the Cauſe *ipſo facto*.

3. This being done, Informations are to be had and made in the Cauſe, like as is ſpoke in the proceedings in Plenary Cauſes, and Sentence is to be given in the ſame manner, as was there directed.

4. There is this one thing, very material to be conſidered which is common to all Cauſes, both Plenary and Summary (and which I omitted in the foregoing part) *Scil.* if the Adverſe Party, againſt whom Sentence is to be pronounced, be Dead after the Sute is Conteſted, and before the Sentence is ſo pronounced, you ought to take care, how you condemn the Perſon Deceaſed, (though perhaps the Sentence is made in preſence of his Proctor) in any thing; becauſe in that caſe, the Sentence would be Null and Void; but let the Sentence be drawn after this manner; We Decree the Party of the ſaid *N.* to be condemned in ſuch a Legacy or in Charges, and to be admoniſhed to pay, *&c.* and in this caſe, after the Term which is allowed by the Law, for an Appeal, is elapſed, (which by the Law is to be done within ten † days, by the Law, but within fifteen days, (by the Statute) from the time of pronouncing the Sentence) the Executors, or Adminiſtrators of the Deceaſed, are to be called to ſee the Sentence put in Execution.

† *Mynſ. Inſt. de excep. Sect. Item ſi, n. 2. Gail. pract. obſerv. l. 1. O. 139. per tot. Mynſ. obſ. Cam. lib. 2. obſ. 2. & lib. 3. ob. 11. Weſemb. de appel. & rela. n. 9. parat. ff. Lit. E.*

5. Now the Sentence is to be requeſted to Execution in like manner as in Plenary Cauſes, a Citation being had againſt the Party, againſt whom Sentence was laid, to ſhew Cauſe why it may not be put in Execution; upon the return whereof it may be put in Execution as before.

6. But if in caſe the Party is Dead as was even now ſaid then the Proctor who obtaineth the Sentence, muſt alledge that after the Sute was conteſted, * or perchance whileſt the Cauſe of Appeal was depending, *N.* (that is, the Party againſt whom the Sentence was given) Died, having made his Will, and appointed ſuch and ſuch Executors who have proved the ſaid Will, Legally; or that the ſaid Deceaſed Died Inteſtate, and that Letters of Adminiſtration of his Goods, are committed to, and taken by *M.* wherefore he muſt requeſt that the ſaid *M.* may be called againſt ſuch a day, to ſhew Cauſe, why Sentence already Read, and Pronounced in ſuch a Cauſe betwixt ſuch and ſuch Perſons, may not be put in Execution, and the Charges taxed. Upon the return of which Citation, the Sentence is to be put in Execution, and all things are to be acted and done, in and about the ſame, (like as was ſhewn in the foregoing part, in the laſt paragraph) as though the Party had not been Dead. We might here proceed to ſhew the order and manner of Relations Conſultations, and Remiſſions, what they are, and when and how done; but I muſt acknowledge this to be *negotium nimis arduum*, and muſt therefore refer you to my Authors, † and ſubmit the matter to the Learned, to receive its illuſtration. Except where Mr. *Clarke* maketh mention of either of theſe, in this his practiſe. I ſhall adventure to make the matter ſo intelligible, as that the meaneſt capacity may in ſome meaſure apprehend them. Thus having ſhewn the whole proceedings, which are common to all Cauſes, both Summary and Plenary in general; I now intend to proceed in my propoſed method, and ſhew how ſome Cauſes require and enjoy ſome priviledges in the proceedings, which are only proper to themſelves, and not to others. Such as are Appeals, Matrimonial Cauſes, Defamations, and Tithes, *&c.* and this with as much method as is poſſible, or can well be Imagined, having ſuch a Labyrinth to wander in, and ſuch a Chaos to model, as all People will (I hope) own Mr. *Clarkes* Practice to be.

And here alſo I might have obſerved (before we enter upon the treatiſe of Appeals) that there are ſome Sen-

tences

* *Philippus Decius in T. ff. de Reg. Jur. Sect. in hæredes, ſi lis cum defuncto ſit conteſtata, tranſit proceſs. ad hæred.*

† *Alciat. prax. de remiſſion. & relation. T. de Senten. Petition. Weſemb. ff. de appellation. & relation. n. 22. Jacob. Bam. Proc. Camera l. 59. n. 15. 14. & l. 25. n. 43. & ſeq. Gail. 1. ob. 11. n. ult. obſ. 121. in fin. & obſ. 42. n. 6. Gymn. tec. Remiſſoriales. Sect. penult. & ult.*

tences which are void *ipſo jure*, and therefore not to be Appealed from: But this being a matter ſo profound, and of too great a depth, for my capacity, and experience, I ſhall therefore refer you to my Authors, † and to the Learned Civilians whoſe Reading and Experience, can better inform them in this point: To whom (like as in this, ſo in all elſe) do I ſubmit.

† *Weſemb. parat. ff. l. 49. t. quæ Sententiæ ſine appellatione reſcindantur.*

# THE PRACTICE OF THE Ecclesiastical Courts.

## *THE FIFTH PART.*

### Of Appeals.

### CHAP. I.

*The manner of proceeding in these Causes in general.*

#### SECT. 1.

1. *What an Appeal is and what are its formalities.*
2. *How many sorts of Appeals there are.*
3. *In what case it is permitted to Appeal from, and to, one and the same Judge.*
4. *It is Lawful to Appeal, from the Dean of* Shoram ( *and other Deans, and particular Commissaries, which belong to the Arch-bishop of* Canterbury ) *to the Official of the Arches, or to the Auditor of the Court of Audience.*

§. *The*

5. *The Manner and Order of receiving and proceeding in Cauſes of Appeal, made to the Courts of the Lord Archbiſhop of* Canterbury, *and their granting Inhibitions thereupon. Alſo what theſe Inhibitions ought to contain, and how certified and proceeded upon.*
6. *The Manner and Order of receiving and proſecuting Appeals made to the Kings Majeſty, which are Tried and Determined by Delegates, and their granting Letters of Inhibition,* &c. *thereupon.*

I Have great need to crave the Readers Pardon for this Undertaking, knowing that in this Treatiſe of Appeals eſpecially, I ſhall become lyable to Blame for not reducing all Mr. *Clarkes* Titles, into their proper Order and Claſſes as Mr. *Clarke* intended them. But I Beſeech, you Good Reader, who ever you are, do me but this right as compare his Chaos with this, and then tell me how little reaſon you have for a Querele; nay I hope you will rather excuſe what is amiſs, or at leaſt regulate it: Either of which I ſhall own as a kindneſs. The method I have propoſed in this Treatiſe of Appeals, is to ſpeak Firſt of the Order of proceedings, and the Practiſe which is common to all Appeals in general, and next, that Order and Practiſe, which is common to thoſe Appeals, which are made from Sentences and Grievances, ſeverally and reſpectively.

1. Now an Appeal † is no more in Law, then the asking or requeſting help, and aſſiſtance from a Superior, againſt the injury done by an inferior Magiſtrate: Or an Appeal is a certain provocation, gradually made, from an inferior Judge, to a Superiour, that he may *de novo*, take cognizance of the Cauſe already tryed, and (as the Appellant intimates) unjuſtly Determined, and that he may reduce the Sentence, already pronounced, into a more equitable State; now theſe Appeals have certain formalities, or ſolemnities to be obſerved: The obſervation of which, are the chief Cauſe, of the Appeals ſubſiſting in their proper

† *Weſemb. ff. T. de appel. & relat. n.* 2, 3.

per form. To the formal part of an Appeal, is requeſted, Firſt that it be done *gradatim*, or gradually; that is, to the next and immediate † Superior Judge, no mediate or other Judge, being betwixt the Judge from whom, and to whom it is Appealed. Secondly, that there be a Solemn manner of Appealing which is two fold; the one which is made *vivâ voce*, with the living voice; the other which is made in writing. Thirdly that there be thoſe things which are more commonly called Solemnities: And thoſe are, the Oath, that it is not frivolouſly Appealed; and alſo that (according to the Cuſtoms, Statutes, or Priviledges of ſome places) a Bond or Caution be given, to proſecute the Appeal, and to pay the thing adjudged, *&c.* Fourthly to this form of Appeal, doth alſo belong the *Fatale Appellationis*; which is a certain ſpace of time, appointed for the Appeal, ſo called *à fato*, that is, Death, for during that time, ſo appointed, the Appeal is ſaid to live; which being expired, it is ſuppoſed as Dead; by reaſon of which Death or expiration, the Appeal is extinguiſhed, like as the natural Life is extinguiſhed by the natural Death. And this *Fatale* is either ſuch as is appointed for interpoſing the Appeal, (which is Ten days by the Law, within which time, the Appellant ought to Appeal, either before the Judge, by whom he is grieved, or before a Notary) or ſuch as is appointed for the proſecuting * of the Appeal; in which time the Appeal ſo interpoſed, ought to be proſecuted to the end.

† *Gail. lib.* 1. *obſ.* 119. *n.* 2.

* *Mynſ. cont.* 1. *ob.* 31. *cont.* 3. *ob.* 54. *Gail.* 1. *obſ.* 141. *Rubric. & lib.* 2. *n.* 1 6. *cum. ſeq.*

2. Now Appeals are of two ſorts, (*Scil.*) either Judicial or Extrajudicial †. The Firſt from the Sentence, the laſt from the Acts and the Extrajudicial Decrees.

† *Weſ. parat. ff. de appel. n.* 5. *Pleniùs verò videas de his app. de verb. ſign. à Sebaſt. Algers. verb. appellatio. Sect.* 15. *per tot.*

The Judicial Appeal is made either from the Sentence. { Definitive, or Interlocutory.

The

The Extrajudicial Appeal may be interpoſed upon ſuch grieveances as any one may ſuffer, by

- Deferring to pronounce Sentence.
- Rejecting ſome concluding matter, ſuch as are cauſed when the Sentence is pronounced.
- An injuſt Excommunication upon a falſe Certificate, of the Citation.
- Immoderate Taxing of Charges.
- Too ſhort a delay or time * wherein to do any Act, *&c.*
- Denying Audience to any one †.

* *Lanf. de interloc. & Ap. n.* 65.
† *Lanf. ibid. n.* 66.

Many other grievances may be inflicted, according to the circumſtance of the matters or things in conteſt, and thence may ariſe Cauſes of Appeal; to enumerate all which grievances, is not within the bounds of any Mans knowledge, or foreſight, to particularize.

3. If a Judge do conſtitute or ſubſtitute, ſome one to proceed upon all Cauſes in his abſence; or another to proceed in ſome particular Cauſe, or in ſome certain particular Cauſes; Or if a Judge doth grant his Authority to certain Clergy-Men, to Examine Witneſſes in remote parts, as in the Fourth Chapter of the Third Part, *&c.* If any grieveance is inflicted, or offered, by this Subſtitute, particular Commiſſary, or Commiſſaries, ſo appointed as aforeſaid; the Party grieved thereby, may Appeal from the ſaid Subſtitute or Commiſſary, *&c.* to the ſame Judge, who appointed that Subſtitute, or gave that Authority: And thence comes this general concluſion, that it is Lawful to Appeal from one who is delegated, to one who delegates.

4. At the beginning of this Book where we ſpoke of the modern Judges, there are expreſt the reaſons why the Official of the Arches, was Anciently called the Dean of the Arches, though in very deed he be no Dean but an Official: Seeing therefore, not only the Dean of the Arches, but alſo the Dean of *Sheram*, and *Croyden* (though ſituate within the Dioceſe of *London*) and *Nynton* are immediately ſubject to the Arch-biſhop of *Canterbury*,

*bury*, and are almoſt exempt from the Juriſdiction of the Diocesan Biſhop, and may Appeal from them, (as from particular Judges, having Juriſdictions limited and reſtrained) to the Courts of Arches or Audience. For the Statute, which is ſet forth, touching the form of interpoſing Appeals, makes no mention of theſe Appeals, therefore they are left, to the diſpoſition of the Common Law; likewiſe for the aboveſaid reaſon, it is Lawful to Appeal from the Commiſſaries, of the Arch-biſhop of *Canterbury*, within the Dioceſe of *Canterbury*, unto the ſaid Courts of the Arches, and Audience.

5. Now if an Appeal be interpoſed, from grievances, or a definitive Sentence, pronounced, or inflicted by an Inferior Judge, in remote parts, an Inhibition is Firſt to be requeſted from the Judge to whom it is Appealed, (*viz.*) from the Court of the Arches, or the Audience; (in which Inhibition, is uſually writ or inſerted, a Citation for the Party who obtaineth the Sentence) † or at whoſe Petition the grievance was impoſed, (which Party is called the Party Appellate,) to anſwer in a Cauſe of Appeal; and by vertue of this Inhibition, the Judge from whom it is Appealed, his Regiſter, and the Party Appellate, are to be Inhibited, that they proceed not further, to the Execution of the Sentence, pronounced againſt the Appellant, whilſt this Appeal depends, nor do any thing to his prejudice: And this Inhibition is to be Certified to the Judge, to whom it is Appealed, with a Certificate thereupon, making mention what day the Judge and Party were Inhibited, and on what day the Party Appellate, was Cited to anſwer in this Cauſe of Appeal. And if the ſaid Party Appellate, do not appear, he is to be proceeded againſt, and Excommunicate in manner and form, as was ſpoke in the Second Part of this Book, where it is treated of the Original proceſs, or Citations.

† *Quæ ſit Inhibitio & quæ debet continere. Roding. pand. Cam. l. 3. tit. 11. Gylmn. voc. Inhibitio, Sect. Differentia. Weſemb. para. ff. lib. 49. t. 7. n. 3.*

*That this is the order and manner of receiving Appeals, and granting Inhibitions as Mr. Clarke ſays, I could produce ſeveral preſidents, in the Courts of the Lord Arch-biſhop of York.*

6. All Appeals, from the moſt Reverend the Arch-biſhop of *Canterbury*, or from his Courts, and Judges, (*viz.*) from his Courts of the Arches, Audience, and Prerogative, are to be interpoſed to the Kings Majeſty, and his Court of Chancery; and the Proctor of the Party Appealing, is wont to draw the form of a Commiſſion, which he ought to intimate

intimate to ſome Maſter in Chancery, ( particularly deſigned for this purpoſe ) together with the Inſtrument of Appeal, if it be Appealed Extrajudicially, before a Notary Publick; or otherways, with a True Copy of the Act, made before the Judge, ( from whom it is Appealed, ) Subſcribed with the proper Hand Writing, of the Writer of the Acts of the ſaid Judge, if it be Appealed at the Acts of Court, at the time of pronouncing the ſaid Sentence: And then this Maſter, doth Teſtify, by a Subſcription under his Hand, on what day this Commiſſion was Exhibited before him; and afterward, the Proctor obtains the ſame under the great Seal of *England*, which he muſt preſent to the Judges, who are Delegated by that Commiſſion, under this form: I *N.* on the behalf of our Soveraign Lord the King, do preſent to your Authority, theſe Letters Commiſſional; and do deſire that ye will vouchſafe to take upon you the Execution of them, and Decree, that the Judge from whom it is Appealed, and the Party Appellate, may be Inhibited, and that the ſaid Party Appellate, may be Cited to appear upon ſuch a day, to anſwer in ſuch a Cauſe of Appeal. Then the ſaid Judges make anſwer thus; for the Honour we bear our Sovereign Lord the King, we take upon us the Execution of theſe Letters Commiſſional, and do Decree, that it ſhall be proceeded upon, according to the tenor of the ſame, and that the Judge from whom it is Appealed, the Adverſe Party and all others be Inhibited, and we Decree the ſaid Adverſe Party, to be Cited to anſwer in a Cauſe of Appeal: And in theſe Appeals to the Kings Majeſty, it is to be proceeded in all things like as in other Cauſes of Appeal, to the Courts of the Arch-biſhop of *Canterbury*. And note that it is very neceſſary, that in every Commiſſion of Appeal, ( and eſpecially thoſe which are Exhibited before the Lord Chancellor ) † the date, or day of the Firſt Exhibition or Preſentation of this Commiſſion, be writ down, that ſo it may appear to the Party Appellate, whether or no the Party Appealing, do duly proſecute this his Appeal within the time Aſſigned him ( by the Judge from whom he Appealeth ( for that purpoſe: Which if he do not then the Appeal may be deſerted; and this deſertion, will

† *Attendite quod ubi literæ delegationis ſunt preſentatæ ſufficit Notario ſcribere talis Exhibuit tales literas, &c. quæ incipiunt ſic & finiuntur ſic, nec eſt neceſſe inſeri totus tenor literarum. Lanfr. in c. quoniam. de prob. n. 9.*

will appear, by inſpecting the Kings Commiſſion; in the proof whereof the Party Appellate, will be very much relieved, ſeeing ſuch deſertion may appear ſo eaſily; but for the better underſtanding this Cauſe of deſertion, obſerve what is ſaid afterward.

## SECT. 2.

1. *What are thoſe four times, which are to be conſidered in Appeals, and how Appeals are interpoſed and when.*
2. *Why there is a neceſſity for the Proctor to Appeal, though his Office is Expired, or Determined.*
3. *The Manner and Order of asking and requeſting Apoſtles or diſmiſſions. And within what time, they ought ſo to be asked and requeſted alſo what theſe Apoſtles are.*
4. *What remedy if the Apoſtles are refuſed; and why you muſt neceſſarily Appeal from ſuch refuſal.*
5. *The Manner of Aſſigning the Apoſtles; and appointing the Appellant to proſecute and Certifie,* &c.
6. *The Manner of the Proctor of the Party Appellate his appearing before the Judge to whom it is Appealed, to get his Decree, for the Party Appealing to proſecute.*
7. *When and in what caſes the Party Appealing (if he cannot get his Appeal Determined in the Firſt year) ought to have a part of the Second year allowed for that purpoſe; and how the Appellant ought to make a proteſtation, what Impediments hindered his getting the Appeal Determined,* &c.
8. *Alſo what theſe Impediments are, which may be alledged to get the* Fatale Legis, *and the* Fatale Hominis *Prorogued.*
9. *In what part of the proceedings the aforeſaid Impediments ought to be alledged by the Appellant in order to get longer time for this his Appeal.*
10. *In what caſe a Second year ought to be allowed, the ſaid Party Appealing, in which to get his Appeal Determined.*
11. *In what caſe, the Proctor Appealing, may be compelled to proſecute the Appeal, and give a Libel, without any Decree for the principal Party himſelf to proſecute.*

12. *When*

12. *When and in what caſes, it ought to be Decreed for the Party Appealing to ſhew Cauſe, why his Appeal may not be declared as deſerted.*
13. *The Manner of proceeding, when the Party Appealing is called ſo to ſhew Cauſe, why his Appeal may not be declared for deſerted.*
14. *The Manner of proving that the Appeal is deſerted in this caſe.*

IN theſe matters of Appeal, there are four times to be conſidered † the Firſt is the time of Interpoſing the Appeal, and that is ten days, Secondly the time of deſiring the Apoſtles, that is thirty days, which take place, immediatly from the Sentence. Thirdly the time of Preſenting himſelf before the Judge (to whom it is Appealed) with this Appeal, Fourthly, the time of Proſecuting this Appeal, ſo interpoſed; and that time is a year, ſometimes two years, which occurs from the time of the Appeal interpoſed; within which time unleſs the Appeal be proſecuted, it is pronounced as deſerted, and the Cauſe is to be remitted back to the Judge, from whom it was Appealed * amongſt the *Saxons* (ſaith *Weſembecy*) † in ſome Caſes, they interpoſe the Appeal immediatly, at the Act of Court; upon the pronouncing the Sentence, or the inflicting the grievance; which practice is rarely obſerved; for we rather reſpect the time limited by the Law, for that purpoſe; therefore whether it be Appealed immediatly at the Act of Court, or not, it is neceſſary, that afterwards (in the due time, appointed by the Law) an Appeal be interpoſed in writing.

† *Weſemb. par. ff. de Appel. T. quando Appel. 4 n. 1, 2, 3 &c. Lanf. de int. & Appel. n. 51. etiam notat. in margine. n. 1. Sect. preceden.*

* *Mynſ. obſ. Cameral. cent. 1. obſ. 8.*
† *Weſemb. ubi. ſupra n. 3. Chilianus in pract. cap. 124, 125. Saxon. lib. 2. art. 6. Mynſ. ubi ſupra cent. 1. obſ. 7. Lanfr. ubi ſup. n. 49.*

2. Now the Proctor, though his Office is Determined and Extinct, ſo ſoon as the Definitive Sentence is pronounced (unleſs the Proxy be Exhibited *de novo*) yet this Proctor ought to Appeal from the Sentence, in due time and place, unleſs his Client do give him ſome contrary order: For otherways, the Client hath an Action againſt his Proctor, (ſo neglecting to Appeal) for ſuch damage as he may ſuffer, by ſuch neglect of his Proctor.

3. If any Appeal from a Definitive Sentence, at the Acts of Court, and doth deſire Apoſtles to be given, and Aſſigned,

ed, and the Judge Aſſigneth a Term, or a time, allowed in the Law, on which to receive Apoſtles; the Party Appealing, ought within thirty days, † (to be accounted from the time of pronouncing the Sentence,) to go (from one time to another and from that hour of the day, in which the Sentence was pronounced, even until the laſt hour of the day, in which the Apoſtles ought to be requeſted) to the Court of Judicature, and if he can have the preſence of the Judge in Court, he muſt deſire and requeſt that he will grant Apoſtles, *Inſtanter*, *Inſtantiùs*, *& Inſtantiſſimè*, that is, with all poſſible ſpeed. And if the Judge who is thus earneſtly ſolicited and called upon, do refuſe to give or Aſſign Apoſtles, then is there juſt cauſe of Appeal upon ſuch refuſal. But if in that day, or time, and place aforeſaid (in which the Party Appealing as above, was preſent and ready to ask his Apoſtles,) the Judge were not preſent alſo, then a proteſtation * is to be made by the ſaid Party Appealing, before a Notary Publick, and Witneſſes, that he is ready and prepared, to ask Apoſtles, if in caſe he could have the preſence of the Judge; and for a further Cautel, let him deſire Apoſtles, before the ſaid Notary Publick, and Witneſſes, and alſo requeſt the Notary Publick, then preſent, to draw up a publick Inſtrument; upon this his proteſtation and requiſition, and alſo the Witneſſes then preſent, to give their Teſtimony thereupon. And like as the Party Appealing, (in order to found the Juriſdiction, of the Judge to whom he Appeals) ought to Exhibit the Inſtrument of Appeal, before it is concluded in the Cauſe: Even ſo in the aforeſaid caſe, he ought to Exhibit the ſaid Inſtrument, made upon the Petition of the Apoſtles, and the proteſtations ſo made before the Notary and the Witneſſes, or otherwiſe he ought to ſuffer and loſe his Cauſe. And here obſerve, that if the Party Appealing, do not deſire, and ask Apoſtles, in manner and form as aforeſaid, he ought to loſe his Cauſe of Appeal, though he might probably have a juſt Cauſe of Appeal, as to the principal buſineſs. Now theſe are called Dimiſſory Libels, becauſe by them, the Cauſe is diſmiſſed to him, to whom it is Appealed. They receive the

† *Weſemb. ubi ſupra. lib. 49. T. de Libellis. dimiſſoriis n. 3. 4. Chilianus. in pract. c. 130.*

* *Weſemb. ubi ſupra. de app. ff. n. 9. de quo utile eſt proteſtari, non tamen neceſſarium. Sit. c. Lanfran. ubi ſupra. de Appel. n. 83. verſ. Secundo requiritur quod proponatur proteſtatio, non eſt neceſſe amplius Appellare. tutius tamen, &c. ad finem. nota bene. & n. 84.*

† *Weſemb. prax. ff. l. 49. T. de Libel. dimiſſ. n. 2. Rosbach. proc. tit. 74. n. 2. Alciat. de Apoſt. per.*

the name of Apoſtles, from the Greek ἀπὸ τῦ ἀποστέλλειν, which ſignifies to ſend † away.

† *Weſemb. parat. ff. l. 49. T. de Libel. dimiſſ. n. 2. Rosbach. proc. tit. 74. n. 2. Alciat. de Apoſt. pet.*

4. And if the Judge, either at the time of pronouncing the Sentence, (when it is Appealed at the Acts of Court) or in the aforeſaid Caſe, on the thirtieth day after the Sentence is pronounced, doth Aſſign Refutatory Libels (that is, thoſe, whereby * he ſhews reaſons, wherefore he thinks not fit, to grant theſe Apoſtles, or Dimiſſory Libels) or doth order, and decree nothing upon your Petition, touching theſe Apoſtles; though you have Appealed from the Definitive Sentence, yet if you do not alſo Appeal from the Denyal of theſe Dimiſſory Libels; or from the aforeſaid Aſſignment of the Refutatory Libels, you will be in danger of loſing your Cauſe. But Mr. *Clarke* bids you enquire as to this point of Practice, though he ſays he has ſeen it thus adjudged. And theſe Appeals you may Proſecute both together, or ſucceſſively; one after another, (if you have Appealed from them both) like as in other Cauſes of Appeal, from the Definitive Sentence, and from Grievances, as the Taxation of charges, *&c.* and if you do not obtain both your Appeals, yet you may obtain one of them, (*viz.*) in your Appeal from the denying of Apoſtles: For you ſhall not obtain your Appeal from the Definitive Sentence, if you do not likewiſe Appeal, from the denying of Apoſtles.

* *Weſemb. ibidem. n. 4. verſus finem, Chilian in pract. c. 130. Roding. Pand. Camer. tit. 23. l. 1.*

5. At ſuch time (as was now ſaid) as it is Appealed before the Judge, *à quo*, or from whom, and that the Apoſtles are asked; the ſaid Judge (moving his Hat from his Head) muſt ſay, For the Honour and Reverence we bear to our Soveraign Lord the King, we grant this Appeal, and inſtead of Apoſtles we Aſſign to the Party Appealing, the whole and all the Proceedings. Then the Party who obtained the Sentence, muſt deſire the Judge, that he will pleaſe to Aſſign the Party (who pretends this Appeal) a Competent time, or times, as well to Proſecute this Appeal, as to certifie the Proſecution of it; Whereupon the Judge Aſſigns three Weeks time, perhaps † for the Proſecution of this Appeal, and a Months time for the Certifying it; during which times, nothing is to be attempted or innovated by the Party (on whoſe

† *Ita practicatur in Curiis Archiep. Ebor. & ita a Lind. innuitur in tit: de appell. c. frequens. verb. proſecuta.*

account the Sentence was pronounced, or the Grievances impoſed,) to the Prejudice of the Party Appealing.

6. Seeing it often falls out, that the Party Appealing doth Inhibit the Judge (from whom he Appeals,) by vertue of an Inhibition, obtained from the Judge, to whom he Appeals, and doth ſo reſtrain his power, that he cannot proceed any further to the Execution of his Sentence, and takes no care to cite the Party Appellate; or perhaps if he hath cited him, takes no care to certifie his Inhibition: In this Caſe the Proctor of the Party Appellate, may appear before the Judge, (to whom it is ſo pretended to Appeal) under a Proteſtation of not conſenting to the ſaid Judge, nor any way proroguing his Juriſdiction, further than by Law he is bound, which Proteſtation being always ſafe, *&c.* he muſt Exhibit his Proxy in Writing for *N.* that is the Party Appellate, and make his part for the ſame, (and under his Proteſtations aforeſaid) he muſt alledge to the ſaid Judge that *M.* the Party Appealing hath obtained from his Court, certain Letters Inhibitory and Citatory, to Inhibit the Judge, from whom it is Appealed and his ſaid Client, (that is the Party Appellate,) by vertue of which Letters, he hath taken care to Inhibit the aforeſaid Judge, but hath not taken care to Cite the Party Appellate, or perhaps hath Cited him, but takes no care to certifie this his Citation, nor to Proſecute this his Cauſe of Appeal: Therefore he muſt deſire the ſaid Judge, (to whom it is thus pretended to be Appealed) to decree that the Party Appealing may be Cited, againſt ſome convenient day to Proſecute this his Appeal, under penalty of having the Cauſe remitted back to the Judge from whom it is Appealed, and the Party Appellate, to be diſmiſſed with Charges: Which Petition, the Judge decreeth; appointing a day for the appearance of the ſaid Party Appealing. And obſerve, that the aforeſaid Proteſtation is alſo very neceſſary, to be made on the day of the appearance of the Party Appellate; leſt perhaps he ſhould ſeem (by appearing ſimply without the aforeſaid Proteſtation) to conſent to the Judge of the Appeal; for if it be not Lawfully Appealed, the Judge hath no power

power to take Cogniſance of the ſaid Cauſe of Appeal, becauſe by this Appeal, the Juriſdiction of the Superior Judge is founded, and the Juriſdiction of the Inferior Judge is ſuſpended; which though it be ſo, yet if the Party Appellate, do appear before him, without the aforeſaid Proteſtations, he ſeemeth to conſent to him, as a Competent Judge on his behalf. But this is to be underſtood as to the Ordinary Judge, who is appointed to take Cognizance of all Cauſes, whether Appeals or others.

7. If the Party Appealing, is diligent to Proſecute his Appeal, in the firſt or ſecond part of the year, and then ſome Impediment doth intervene, which Impediment being removed, there remains only ſo much time, (and no more) as might ſerve the Party Appealing, if he is diligent to get his Appeal determined in, then in this Caſe, a ſecond year is not to be given this Party thus Appealing, but he is to have ſo much of a ſecond year given him, as he was hindred, or loſt in the firſt year: And ſo a Computation is to be made of one year, out of the days of the ſecond year, by allowing ſo many days, as were really loſt, or elapſed by ſome Impediment, or hinderance. Mr. *Clarke* ſaith that he hath ſeen this allowance made in a Court of controverſy ſome years ago; but he ſaith, that the late Doctors hold the contrary opinion, (*viz.*) that no time or proportion of the ſecond year, ought to be given in Lieu of ſuch Impediment, if there remained as much time, (after ſuch hinderance) of the firſt year, as was ſufficient for the Determination of this Appeal, if the Appellant had been diligent: Therefore conſult the *Juris peritos*, in this Cauſe. But a ſufficient time to Proſecute and Determine Appeals † is ſaid to be one Month, though ſome hold that as much time may be appointed for this purpoſe, as the Judge thinks fit in his Judgment to appoint, or is ſufficient. Now the Civilians are of opinion, that although ſo[illegible] Impediment was

† *Lanfr. de interloc. & App. n.* 53. *tempus appellationis finiendæ de jure communi eſt annus, & ex legitima cauſa biennium, ſed hoc ſat. in Camera non eſſe obſervatur. de verb. ſign. a Sebaſt. Alm. verbum Appellatio Sect.* 12. *Gail.* 1 *Obs.* 141 *n.* 8. *Myns. cent.* 6. *Ob.* 2 *n.* 6. *Roding. pand. Cam. lib.* 1 *tit.* 28. *Jacob. Blum. proc. Cam. tit.* 49. *Alciat. de Appellation. Sect. intra quæ tempora in fine. Lind. de ſequeſt. poſſeſſ. Sect. ſi tamen verb. proſecuta ad proſequendum non ſtatuitur terminus à jure, ſed ad finiendum ſtatuitur annus, & ex cauſa biennium. & in tit. de appel. c.* 1. *verb. proſecuta.*

caused by the Adverse Party or the Judge from whom it is Appealed, so that the Cause cannot be ended in the first year, or if there were any other Lawful Impediment, so as the Party Appealing, may or is not bound to proceed in the Cause, yet it is convenient, (at least it is safe) that the Party Appealing, (in all Acts, in which these Impediments do appear) do take notice to the Judge of such Impediments, and protest concerning them, that they are such; especially if the said Impediment be made by the Judge, or any other third Person: And this he must do to the following effect: (*Scil.*) I protest that there hath not, doth not, neither shall stand any Impediment or Cause, on my behalf, so as this Cause may not be determined within the time appointed by the Law, but that it doth stand on the part of the Judge, or the Party Appellate, or the said third Person, so as it cannot be determined.

* *de hisce plura videas apud Alciat. de Appell. in exceptionibus ad regulam mortuo in Sect. Intra quæ tempora. Lanfranc. ubi supra. n 53. vers. Ecce ultima. Authentica de appell. col. 8. & extr. de appell. cap. significantibus.*

8. The Causes * which may be alledged to the purpose aforesaid, or those Impediments here spoke of, may be these. 1. If the Party Appellate being Cited to answer the Party Appealing, in a Cause of Appeal, doth not appear either by his Proctor, nor in Person, and if the Party Appealing doth use all diligence † to get the said Party Excommunicate, *&c.* this is a just Impediment, at least for such a time, in which the Party Appellate stood Excommunicate. 2. If the Party Appellate doth give in or Exhibit any contrary matter, or exception, which is not to be admitted, or perhaps which may be, and is admitted, and yet doth defer the Sute as to the proof thereof, but proves nothing, this is a Lawful Impediment; because that during that delay, so given to prove, *&c.* the Party Appealing, cannot ask any thing, in order to bring the Cause to a conclusion. 3. Also if the Proctor of the Party Appealing doth give any conclusive matter, which ought by Law to be admitted, and yet the Party Appellate, doth so oppose the same, that he hinders the admission of it; if afterward the said matter is admitted, and is proved, this is an Impediment for such time, as the admission was hindred, and is to be computed from the day in which the matter was offered.

† *Lindwood. de sequest. c. frequens. verb. prosecuta legitime itaq; appellationem prosequi intelligitur qui facit suam diligentiam ut eam possit infra annum terminare & ibi dicitur quod terminus prosecutionis, prorogari possit ex consensu partium.*

4. Also

4. Alſo if the Party Appealing be ſo poor, that he cannot Proſecute and finiſh his Cauſe, this his poverty being proved, he ought to have a ſecond year allowed him, as is ſpoke afterward. 5. Likewiſe if the Party Appealing be Impriſoned, all the firſt year, or ſo long a time of it, that he hath not time enough remaining to finiſh this his Appeal, this is alſo a juſt Impediment. 6. Alſo if the Party Appealing is hindred by ſome Epidemical diſtemper as the Plague, *&c.* or ſome other Judgments of God, or the Command or Edict of the Prince, ſo as he cannot come to Proſecute this his Appeal, this is alſo a juſt Impediment. 7. Alſo if the Party Appealing, doth take care, to get the Judge from whom it is Appealed, and his Regiſter to be admoniſhed to tranſmit the Proceedings; and on the day aſſigned for the tranſmiſſion of them, doth accuſe the contumacy of the ſaid Regiſter and Judge, and doth inſiſt to have them decreed Excommunicate, and doth offer a Schedule of Excommunication, which he deſires may be read, and that Juſtice may be done: But the Judge to whom it is thus Appealed, careth not to Excommunicate the ſaid Judge, (from whom it is ſo Appealed) and his Regiſter, but reſerveth the Penalty of their contempt, from one day to another, ſo that the Proceedings are not tranſmitted in due time; this therefore may be accounted a Lawful Impediment: For the Proceedings not being tranſmitted, the Cauſe cannot be Proſecuted: Therefore let the Proctor Appealing take care, that the ſeveral Reſervations, which are made of their contempt, (for not tranſmitting the ſaid Proceedings) be mentioned in the Acts, but not that they were made at his Petition. 8. If in the laſt part of the year, (*Scil.*) the laſt two or three months at the end of the ſaid year, the Cauſe (by the mutual conſent of the Parties) is put to Arbitration, and referred to Arbitrators, and that the Parties are mutually bound, or have promiſed by word of Mouth, that during this Arbitration, the Proceedings ſhall be ſtaied, or that they will ſtand to this Arbitriment, and if this Arbitration is not determined, until the end of the firſt year, in this Caſe, a ſecond year ought to be

given. 9. If the premiſſes, or any other Lawful Impediments do happen in the ſecond year, then the Party Appealing ought to deſire a reſtitution of the third year; for by Law, a third year ought not to be given, but the ſaid Party Appealing ſhall obtain the benefit of a third year, by way of reſtitution, and the ſaid Party Appealing, ought to uſe all poſſible diligence in the Proſecution of that Appeal, in that third year. And theſe Impediments are they which may be urged, as Cauſes why the *Fatale Juris* (or the time limited by the Law, for the proſecution of Appeals,) may be prorogued. There are yet other Impediments, which may be urged as Cauſes, for the proroguing the *Fatale hominis*, † (which is the time aſſigned or limited by the Inferior Judge, for the proſecution of the Appeal) and theſe may alſo be added to the former; *viz.* the tediouſneſs of the Journy, (which the Appellant is to take) from the place of Judgment, or the Court of the firſt Judge, to the place or Conſiſtory of the Judge, to whom he intends to Appeal; (being perhaps an hundred miles diſtant) in order to obtain an Inhibition, within the time aſſigned to Proſecute, and Certifie; in this caſe, the Appeal may be ſaid to be Proſecuted, though the time aſſigned by the inferior Judge, be elapſed before the Party Appealing, return from his Journy, *&c.* Likewiſe if the ſaid Party Appealing from the Courts of the Arch-biſhop, do (within the time aſſigned to Proſecute,) uſe all diligence to obtain the Kings Commiſſion, * upon his Appeal, and the Lord Chancellor is not at leiſure to Seal this Commiſſion, yet the Appeal is Proſecuted, though the Commiſſion bear date, after the day given or aſſigned to proſecute; and in theſe caſes, the time ought to be Prorogued for the purpoſe aforeſaid. Likewiſe in thoſe caſes in which it is Appealed to the Courts of the Arch-biſhop, if the impediment happen on the account of the Judge to whom it is Appealed, refuſing to grant, or Seal his Inhibition, yet the Appeal is ſaid to be duly Proſecuted. So as the ſame be requeſted, before the day aſſigned to Proſecute, or if the Inhibition be offered within the Term, or before it be elapſed. If the Party Appealing, (before the day aſſigned to Proſecute his Appeal) doth go to the Judge (from whom

†*Mynſ.obſ.cent. 2. obſ. 15. & 22. Gail. 1.obſ. 140. n. 4. Ord. Com.p.2.tit.30. Fatale legis & hominis quid ſint vide de verb.ſign.à Sebaſt. Alm.verb. Appellatio.*

* *Et dicitur quis Appellationem proſequi qui literas impetrat. Lind.de Appel. c. freq. verb. proſecuta.*

whom it is Appealed) or his Regiſter, for a Copy of the Sentence, or Copies of the Acts of Court, (in order to Proſecute this Appeal) and theſe things are denied him, or at leaſt, they ſo delay to deliver them, that in the mean time, this Term aſſigned to Proſecute, *&c.* is elapſed; this may alſo be ſaid to be a juſt impediment, and may have ſufficient reaſon, for the proroguing the Term to Proſecute, *&c.*

9. But if theſe Impediments † which hinder the Proſecution of the Appeal within the *Fatale hominis*, or the *Terminum Juris*, do not appear by the Acts of Court of the Judge (to whom it is Appealed) it is the part of a cautious Proctor, to alledge theſe Impediments, before it be concluded in the Cauſe: For ſaith Mr. *Clarke*, I have known it adjudged, that the Party Appealing, ought not to be admitted (after the Cauſe is concluded,) to alledge thoſe Impediments (which hinder the Proſecution of the Appeal) not appearing by the proceedings. Likewiſe if the Party Appellate do alledge, that the Appeal is deſerted, the Judge doth aſſign two times, or Terms, to hear his pleaſure, whether the Appeal be deſerted or not, becauſe upon theſe two aſſignations, the matter is ſaid to be concluded as to that Article of deſertion, therefore it is not permitted, to prove the Impediment by Witneſſes, after it is ſo concluded upon the aforeſaid Article, though perhaps it be not concluded upon the principal Cauſe or Appeal. But here it is to be noted, that although it be alledged by the Party Appellate (that is, the Party againſt whom the Appeal is inſtituted,) that the Appeal is deſerted, (which allegation is denied by the Party Appealing) and that the Judge doth (at the Petition, of the ſaid Party Appellate) aſſign to hear his Sentence, if in caſe the Appeal be not deſerted, and that not only once, but twice, or oftner; in this caſe, the Party Appealing (notwithſtanding ſuch frequent aſſignations ſo to hear Sentence) may alledge, and prove the Cauſes of impediment, if they appear not by the proceedings themſelves. The reaſon is, becauſe the aforeſaid aſſignations, were not abſolute, but conditional, (to wit) if in caſe the Appeal were not deſerted: But in theſe caſes conſult the Learned Advocates: Though I (ſaith Mr. *Clarke*) write

† *Si Appellans non proſequens Appellationem infra Terminum ſibi a jure vel homine præfixum probare velit ſe legitimè impeditum admittetur ad hoc antequam lis ſit conteſtata. Ita. Lind. de Appel. c. frequens verb. Proſecuta.*

write nothing but what I have known, and ſeen practiſed.

10. If the Party Appealing, were negligent in the firſt and ſecond part of the year, and yet diligent in the third part thereof, in which did remain ſo much ſpace of time, as might ſerve to get his Appeal determined, unleſs ſome Impediment happen, * by which he is Impedited, ſo as he cannot finiſh his Cauſe; he ought in this caſe, to have a ſecond year allowed him, the Impediment being Lawfully proved, ſo as it do appear by the Acts of Court, that the Party Appealing hath uſed his utmoſt endeavours to proſecute and finiſh his Appeal, in the ſaid third part of the firſt year, and that he might probably have ſo determined it, had not this Impediment happened: Though ſome are of opinion that where ſuch Impediment doth happen in the end of the firſt year, all the ſecond year ought not to be given, but only ſo much time of the ſecond year, as the Party Appealing was hindred or loſt in the firſt year.

* *De hac materia latè tractatur a Lanfr. de Ap. n. 53. verſ. quæro ulterius etiam à Lind. de Appel. c. 1. in gloſs. ſuper verbo Proſecuta & Lanf. ubi ſup. n. 51, 52. bene nota.*

11. Now ſo often as it is Appealed from the Sentence of Excommunication, inflicted by an inferior Judge, the Proctor of the Party Appealing is wont, and is bound to exhibit his Proxy for the ſaid Party Appealing, (in order to obtain the Inhibition and an Abſolution) and make his part for the ſame; which thing is not uſual, in obtaining other ordinary Inhibitions. Therefore in this caſe, the Proctor of the Appellate, (ſeeing the Proctor of the ſaid Party Appealing is ready to proceed in Court) may deſire a Libel of the ſaid Proctor of the Party Appealing, or elſe his Client to be diſmiſt, without having any decree againſt the principal Party to Proſecute. And if the ſaid Proctor, doth not give in his Libel, then the Party Appellate, is to be diſmiſſed, and the Cauſe is to be remitted back to the Judge from whom it was Appealed, in like manner, as if the Party himſelf had been called to Proſecute his Appeal.

12. At the ſixth number of this Paragraph was ſhewn, that if any do Inhibit the Judge, and takes no care to cite the Party Appellate, or perhaps do Cite him but doth not Proſecute his Cauſe, he may be called to Proſecute the ſame, under penalty of a final remiſſion of the Cauſe, and

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a diſmiſſion of the Party, *&c.* So likewiſe if in caſe of a deſertion, a whole year be elapſed from the day, on which the Inhibition was ſerved on the Judge, from whom it is Appealed, or at leaſt from the day of pronouncing the Sentence, or impoſing the Grievances, from whom it is Appealed; then is it Lawful for the Party Appellate, to call the Party Appealing (unleſs his Proctor be preſent in Court) to appear on ſuch a day, to ſhew cauſe if he can, why the pretended Appeal (interpoſed by him) from the definitive Sentence, or from certain pretended Grievances, may not be Pronounced for deſerted, if there be any Appeal (becauſe ſometimes Inhibitions are obtained, when there is no Appeal) and alſo, why the Party Appellate, may not be diſmiſt, and the Cauſe remitted back to the Judge, from whom it is thus pretended to be Appealed, together with charges, this decree is wont and may be asked by the Appellate, and may be granted by the Judge, if the Party Appealing, doth not Proſecute his Appeal within the *Fatale hominis*, (that is) the Term aſſigned by the inferior Judge, for that purpoſe.

13. Now this Decree or Mandate, being Executed and returned, if the ſaid Party Appealing do not appear, or if he doth appear, but alledgeth no Cauſe, why his Appeal may not be Pronounced for deſerted; nor doth give a Libel, or deſire a Term for that purpoſe: Then the Judge, at the requeſt of the Party Appellate, may either by his Sentence in Writing, or by his interlocutory Decree, Pronounce the Appeal to be deſerted, and remit the Cauſe back to the Judge, from whom it was ſo Appealed, and diſmiſs the Party Appellate, with Charges Taxed, or to be Taxed. But if the ſaid Party Appealing do appear, and give a Libel, or doth deſire a Term for that purpoſe, and that it may be proceeded in the Cauſe of Appeal, the Party Appellate may alledge that the Appeal is deſerted; and if he takes upon him to prove this his Allegation, the proceedings are to be ſtaid as to the Cauſe of Appeal, until this Allegation as to ſuch deſertion, be either proved or not proved. And if it is proved that the Appeal is ſo deſerted, then the Appealing Party, is to be condemned in Charges, and the Cauſe is to be Pronounced as deſerted, and

and is to be remitted to the Judge * from whom it is Appealed. But if on the contrary, the Party Appellate doth make default in the proof of such desertion, the Party Appealing, may first obtain a Sentence, or an interlocutory Decree, that the Appeal is deserted, with a Condemnation in Expences, and then he may give in his Libel, and proceed in the principal Cause: Yet it is but requisite that the Party Appealing, (in every act or thing, done at the time of the said objection) do protest and aver his diligence, and that he is then ready and prepared, to Prosecute this his Appeal, if in case he were not hindred in the Prosecution of it, by such objection made by the Adverse Party.

* *Lind. de sequestr. Sect. si tamen verb. Prosecut. verf. Ut. in glos.*

14. In this case, it must be alledged in all things and proceeded, like as is spoke afterward, in the following Sect. As to the form of alledging a desertion, *&c.* for as was said before, after the Cause is concluded, no Impediments can be alledged to hinder a desertion of the Appeal, except such as appear by the acts or things done; therefore for the Party Appellate, in order to prove that the Appeal is deserted, it is sufficient that he shew the day on which the Sentence was Pronounced, and the Act of Court (upon the assignment of a time to Prosecute) from which will appear easily, that the Appeal is deserted, in not being Prosecuted, within the *Terminum hominis*: As also this desertion may be proved by the date of the Inhibition, or by the first act upon the granting thereof, if it were with an absolution. But if neither the Inhibition be returned, nor any act be done, touching the granting of the same, then the said allegation of desertion, is to be proved by Exhibiting the act of the Judge, (from whom it is Appealed,) upon the Pronouncing the definitive Sentence, Subscribed with the proper Hand-Writing of the Register of the said Judge. And if this act be owned and confessed, by the Proctor of the Party Appealing, (*viz.*) that the said Copy, is a true Copy of the acts of the aforesaid Inferior Judge, or that it is Subscribed by the Hand of the Register of the said Judge, and doth agree with the Original, if by inspecting the same, it doth appear to the Judge, to whom it is Appealed, that there is a whole year elapsed, from the day of Pronouncing the said Sentence, or rather from the

the time of interpoſing this Appeal, if it appears that there is any, then muſt he proceed and Decree in all things, as is mentioned in the number foregoing. But obſerve that although the Party Appellate, do call the Party Appealing as above, to ſhew cauſe, why this Appeal may not be declared for deſerted, or forſaken, and if he knows for certain, that the Appeal is deſerted, yet may he omit this objection and permit the Party Appealing to give in his Libel, and proceed in the Cauſe, until the proceedings of the Judge, from whom it is Appealed, be tranſmitted, and then he may alledge, the deſertion of the Appeal. And ſometimes it is expedient for the Party Appellate, to defer his Propounding and Objecting, this deſertion of the Appeal, until the Proceedings are tranſmitted: For if it is Appealed Extrajudicially, before a Notary Publick in Writing, ſo that neither the Appeal nor the Inhibition of the Judge (ſeeing it remains in the cuſtody of the ſaid Party Appealing) are in the Regiſters cuſtody, it cannot appear, whether the Appeal is deſerted or not. Therefore when once the Proceedings of the ſaid Judge from whom it is Appealed, are inſpected, it may eaſily appear. And if in this caſe the Party Appellate, doth alledge a deſertion, if any Impediments do intervene, ſo that the Party Appealing, cannot Proſecute this his Appeal, the ſaid Impediments ought to be alledged, and made appear what they are, (as at number the eighth laſt before going) in order to hinder the Appeal from being deſerted, and like as the Party Appellate may alledge the deſertion of the Appeal, for not being Proſecuted within the Term of the Law, ſo alſo may he alledge the deſertion of the Appeal, for not being Proſecuted within the *Terminum hominis*, or the time aſſigned for that purpoſe, by the Inferior Judge; in both which caſes alſo the Party Appealing, may alledge and urge thoſe Impediments, mentioned at the eighth number of this Sect. in order to hinder the Appeal from being deſerted.

SECT.

## SECT. 3.

1. *Of any Inhibition with an Abſolution, in what order Granted, and Executed,* &c.
2. *The form of the Proctors Petition, (before the Judge to whom it is Appealed,) in order to obtain this Inhibition with the Abſolution, and the manner of drawing the Act of Court thereupon.*
3. *Of a ſimple Abſolution, or an Abſolution made abſolutely, and not to a day.*
4. *In what caſe the Contumacy Fees, are to be depoſited at the Acts of Court, before the Abſolution is granted.*
5. *Of things attempted to be done by the Inferior Judge, after the Inhibition.*

SOmetimes, the Judge from whom it is Appealed, in that Sentence which he Pronounceth againſt the Party who is caſt, or perhaps after the ſaid Sentence is pronounced, doth Excommunicate the Party againſt whom he gives Sentence; as in Cauſes of Temerary Adminiſtration; of Defamation, (when it is ſued upon the Penalty inflicted in the Provincial Conſtitution,) in a Cauſe of hindering or oppoſing a laſt Will; and ſometimes after Sentence, as in Cauſes for not paying Tithes, or Charges, or a Legacy adjudged: Sometimes alſo the Judge doth Excommunicate a Party, for not obeying his Monitions, or Orders which precede the Sentences. And if in theſe caſes it be Appealed, then an Inhibition is to be Decreed by the Judge, to whom it is Appealed, not only to Inhibit the Judge from whom, *&c.* and to cite the Party Appellate, (as was ſpoke in the firſt Sect. of this Chapter, at the fifth number) but alſo in the ſaid Inhibition, is to be inſerted an Abſolution, from the aforeſaid Sentence of Excommunication, until ſome competent day, to be appointed at the pleaſure of the ſaid Judge. And likewiſe in the ſaid Inhibition is to be inſerted, a Mandate to all Rectors, *&c.* but the Literate perſons are to be omitted, (though mentioned in the ordinary Inhibition,)

tion,) becauſe Excommunications, or Abſolutions, are not wont to be denounced by any but a Clergy Man. Yet this Inhibition, in its *Exordium*, ought to be directed in general to all and ſingular, *&c.* ſo that a literate perſon, may Cite or Inhibit, but in the end of it, it ought to be directed to all Rectors as above, to publiſh the ſaid Excommunication, or Abſolution, and to denounce the Party Appealing to be abſolved until a certain day, *&c.* and in all things as in the ſecond part of this Book, where it is ſpoke of the manner of denouncing Excommunications. And obſerve that the Party who obtains this Inhibition aforeſaid, ought to take care, that the act be drawn, upon the granting of the ſame; and the ſaid Party ought to Appeal before the Judge *ad quem*, or at leaſt he ought to alledge in Writing, that it is Appealed in due time and place.

2. Now the Proctor of the Party Appealing, and deſiring this Inhibition and Abſolution, muſt appear in this form. I. N. *do Exhibit my Proxy in Writing for* M. *and do make my part for the ſame, I Appeal and deſire Apoſtles, I Complain, Proteſt and do all things, as are contained in the preſent Protocol of Appeal.* (And then let him Exhibit this Protocol, of Appeal, before the Judge to whom he thus Appeals, and leave the ſame at the Act of Court.) Or thus (if he have Appealed within ten days before a Notary Publick,) 'I alledge, that it was Appeal-'ed by me in due time and place, as well from a pretend-'ed definitive Sentence, or from certain Grievances im-'poſed by ſuch a Judge, as alſo from a certain Sentence of 'Excommunication, inflicted upon my Client; and there-'fore I deſire that the Judge, from whom I thus Appeal, 'the Writer of his Acts, and O. the Party Appellate, in ſpe-'cial, and all manner of perſons elſe whatſoever, in general, 'may be inhibited, leſt (whilſt this Appeal or Complaint, 'doth depend undetermined) they or any of them, ſhould 'attempt to do any thing, in prejudice of this Appeal, ſo as 'that my Client ſhould not have free liberty to Proſecute 'the ſame; and alſo I deſire that the ſaid O. the Party Ap-'pellate, may be cited to appear on ſuch a day, to anſwer 'M. my Client in this his Cauſe of complaint, and Appeal. Then upon all theſe things, an Act is to be drawn by the

Regiſter

Regiſter, and the Judge Decrees the Inhibition and Citation, as is deſired; and then the Proctor Swears in the name and behalf of his Client, that he will obey the Law, and ſtand to the Mandates of the Church. Then the Judge is wont to abſolve the Party to a day, and Decree Letters Teſtimonial, upon this his Abſolution, without paying Charges unleſs it be Decreed by the Judge from whom it is Appealed, for the taking his body, before the Appeal were interpoſed.

3. Whenſoever it is Appealed, from Sentence of an Excommunication, Pronounced in the definitive Sentence of the Judge, from whom it is Appealed, or before or after his Sentence, though at the time of granting the Inhibition, the Abſolution be made to a day; yet by the ſtile of all the Courts of the moſt Reverend the Arch-biſhop, (time out of mind) it hath been uſed, that ſo ſoon as the Party Appealing gives in his Libel, he is to be abſolved from the ſaid Sentence of Excommunication abſolutely: And though it is often alledged, that this ſimple Abſolution ought not to be made, otherwiſe than from one day to another, (*viz.*) until the end of the Suit, that if by the Sentence of the Judge, to whom it is Appealed, it ſhould be Pronounced, that the Party hath unjuſtly Appealed, the ſaid Party ſhould continue in that State or Sentence of Excommunication, already inflicted by the Judge, from whom it is Appealed, which otherways could not be if he were ſimply abſolved; yet hath it been often adjudged, for this Style or Cuſtom, (*viz.*) that the Libel being given, the Party Appealing is to be abſolved abſolutely.

* *Hæ expenſ. fuſius traduntur in ſecunda parte hujus libri, part. 2. c. 3. Sect. 3. n. 3. & alibi. Haud vero hujus tituli particularis, harum expenſarum mem.*

4. If any do not Appeal from the Sentence of Excommunication, before he hath ſtood forty days (from the time of denouncing the ſame) Excommunicate, and is ſignified, in order to the taking his body: In this caſe the Party deſiring the Abſolution, is not to be abſolved until he firſt depoſite into the hands of the Regiſter, ſuch Contumacy Fees as are to be Taxed by the Judge *. And what theſe expences are Mr. *Clarke* ſays, you muſt read his Trial (*Quæ expenſæ dicuntur expenſæ Contumaciæ*) and there you may be fully informed: [it's likely you may ſo,

*à Lanfr. autem. c. de expenſis n. 22. & uſq; ad finem. etiam. ab Alciat. de exp. fol. 192. (quem bene nota uſq; ad finem fol. 193.) ſat amplè traditur.*

if

if you can find it, but I am ſure I find not ſuch a Title, in all his Book; therefore I refer you to *Lanfranc*, *Alciat* and others.] Yet becauſe it doth not appear to the Judge, what Charges were made by the Adverſe Party, until the ſaid Party appear, therefore the Proctor who deſireth the Abſolution, ought to give Bond, or to Swear, that (over and above the ſum depoſited at the Act of Court,) he will pay all manner of Charges, which ſhall afterward be Taxed by the Judge; in which caſe, the Adverſe Party, may inform himſelf of other Charges, beſides the ſum Taxed: and alſo it ought to appear to the Judge, whether or no there were Letters of *Significavit*, in order to apprehend the ſaid Party Appealing; which if ſo, they ought to be alledged, and Letters of *Significavit* ought to be made to the King in order to releaſe the ſaid Excommunicate perſon, *&c.*

5. If (after the Inhibition is Executed upon the Judge, or after it is Appealed from his Sentence in the Acts of Court, or whilſt the Term which is given to Proſecute doth depend, or whilſt the Term which is allowed by the Law for that purpoſe, doth depend, (*viz.*) ten days, or the time allowed by the Statutes of this Kingdom, (*Scil.*) fifteen days) the Judge from whom it is Appealed doth interpoſe any Decree, which is prejudicial to the Party Appealing in any reſpect, to wit, if he doth Excommunicate him, or doth make any manner of aſſignment, any way prejudicial to the aforeſaid Party Appealing; or if the Party who obtaineth Sentence, (after the Appeal is interpoſed from the ſaid Sentence in his preſence, and after he is ſenſible, that both he and the Judge are Inhibited, or whilſt the time for Proſecuting this Appeal, is in dependence as above) doth attempt any thing, in prejudice of this Appeal: Then the Proctor Appealing, ought to alledge before the Judge (to whom he Appeals) that he did Appeal in due time and place, from the definitive Sentence Pronounced by the Inferior Judge, in ſuch a Cauſe, and betwixt ſuch Perſons, or from certain Grievances, *&c.* and alſo that the ſaid Inferior Judge, from whom it is Appealed, and the Party Appellate, were Inhibited in due time and place, by vertue of an Inhibition, taken from this

this Court, as may appear fully, by the Certificate made thereupon, and remaining in the cuſtody of the Regiſter: And that notwithſtanding this Inhibition, the ſaid Judge from whom it is Appealed, hath proceeded in the ſaid Cauſe, attempting againſt the ſaid Inhibition: And here he muſt expreſs particularly what thoſe things are, which are ſo attempted by the Judge and the Party: And then he muſt deſire, that theſe things ſo attempted, may be revoked in the firſt place. Then (if theſe things ſo alledged, are not denied by the Party Appellate) the Judge to whom it is Appealed, † ought to revoke the ſaid things ſo attempted to be done by the Inferior Judge, *&c.* as aforeſaid; for this Allegation, touching the Revocation of the things attempted, *&c.* is wont to be made, in the preſence of the Proctor of the Party Appellate. But if the matters ſo alledged are denied, then they ought to be proved by the Acts of the Court of the Judge, from whom it is Appealed, and the Certificate of the Inhibition: Or elſe by Witneſſes, if the things ſo attempted to be done, were attempted out of Court, by the Party Appellate; and then they are to be revoked as above; and the Party ſo denying them, is to be condemned in Charges, which the Party Appealing is put to, in the proving the ſame. The Party Appealing, may alſo call the Judge from whom he Appeals, to anſwer in a Cauſe of Contempt, and may object the Premiſſes; and if the things attempted (as before) are made appear, the Judge to whom it is thus Appealed, ought not only in the firſt place, to revoke all and ſingular the matters and things, ſo attempted; but alſo (if it is requeſted,) he ought to condemn the ſaid Judge ſo attempting, and the Party Appellate, in ſuch Charges as are made, and alſo puniſh them at his pleaſure. And obſerve that if the Party Appealing, will proceed in this buſineſs, about the attempts, he is not compelled to Proſecute or Proceed in his Cauſe of Appeal, until the attempts be firſt diſcuſſed, and retracted; at leaſt that ought to be firſt requeſted, leſt he ſeem to recede from them: Yet the ſaid Party Appealing, ought to take care, that his Appeal be not deferr'd, whilſt he is Proſecuting his Cauſe of attempts;

† *Lanf. de Ap. n. 76. plures ponuntur caſus, circa attentata. an. 76. ad num. 80. quando poſſint ſeu non poſſint revocari. Quæ ſunt obſervatu dignæ Weſemb. parat. ff. l. 49. t. nihil novari. n. 3. Robert. Lancellot. tract. de attentat. & innovat. p. 1. in Præf. n. 20. Gail. 1. O. 147. n. 1. & O. 148. Tuſch. tit. Acon. 542. Jacob. Blum. proceſſus Cameral. tit. 35. n. 20, 21, 25.*

tempts; which inconvenience, he may eaſily remedy, having liberty to proceed in both together.

## SECT. 4.

1. *The Form of the Party Appellate his Appearing, and deſiring a Libel,* &c.
2. *The manner of diſmiſſing the Party Appellate with Charges, if the Party Appealing being cited to Proſecute, doth not appear.*
3. *The manner of Alledging that the Appeal is deſerted.*
4. *The manner of deſerting the Appeal, if it be not Proſecuted and Certified, within the Term or Terms, aſſigned by the Inferior Judge, for that purpoſe. And what Cauſes may be objected to hinder ſuch deſertion.*
5. *The manner of deſerting the Appeal, if it be not ended within the firſt year, and the Petition thereupon.*
6. *The manner of giving a Libel in theſe Cauſes, and deſiring a monition to Tranſmit the Proceedings and a Term Probatory.*

THE Party Appellate being to appear, his Proctor appears before the Judge, to whom it is Appealed, on this manner, 'I. M. under Proteſtation of not conſenting 'to the Judge of this Court, as a Competent Judge on my 'Clients behalf, nor Proroguing his Juriſdiction upon any 'account, further than by Law I am bound, (and this my 'Proteſtation being ſafe and accounted as repeated in all Acts 'or Things, done and to be done) I Exhibit my Proxy in 'Writing, or at the Acts of Court (if he be conſtituted ſo) 'for N. the Adverſe Party, and I make my part for the ſame; 'and I deſire a Libel, or elſe that my Client may be diſmiſ-'ed, and the Cauſe remitted, to judge from whom it is Ap-'pealed, together with Charges. And then the Party Appealing, muſt either give in a Libel, or elſe he muſt deſire time until the next Court day, in which to give his Libel: And obſerve that the aforeſaid Proteſtation is very requiſite, leſt the Party Appellate, ſhould ſeem to conſent to the Judge, to whom it is Appealed.

2. If in case the Proctor Appealing, hath been Lawfully cited to Prosecute his Appeal, the Proctor of the Party Appellate, must draw a Certificate upon the Citation, which was taken out to that effect, (according to the usual form of Certifying them) and upon the day mentioned in the Citation, for his appearance, the said Proctor of the Party Appellate, must (under the aforesaid Protestations) Exhibit the said Original Mandate, with the Certificate thereupon, and he must accuse the Contumacy of *M.* the Party pretending an Appeal, being cited to appear on this day, in this place, in order to Prosecute his Appeal under Penalty of final dismission, and remission of the same, to the Judge from whom it is Appealed, and of dismission of the Party Appellate, and also under Penalty of condemning him, the said Party Appealing in Charges made and to be made on the part of the said Party Appellate; then the Judge causeth the said Party Appealing so cited as aforesaid, to be called (by the Crier of the Court, that is, the Apparitor, or Beedle, or in his absence any other) three times publickly; and if he appear not, then the Judge at the Petition of the Proctor Appellate aforesaid, doth Pronounce the said Party Appealing to be Contumacious, and in Penalty of such his Contempt, he doth dismiss the Party Appellate with Charges, and doth remit the Cause back to the Judge, from whom it was Appealed, and doth licence him, to proceed in the principal Cause, begun before him, notwithstanding the Inhibition, which was taken out by his Authority. And then the Judge, at the Petition of the Party Appellate must Tax the aforesaid Charges, to the sum of Thirty Three Shillings, Four Pence, and Decree a Monition for the payment of these Charges, *&c.* and observe, that in this Case, (*viz.*) for the not Prosecuting this Appeal, and by the Style of all the Courts of the Archbishop, it hath been used (time out of mind) that no Schedule of Charges is offered, nor any Oath Administred, upon the Taxation of these Charges, as in other Taxations of the Charges of Sute; but *quære*, how far this Custom of the Court, is available against the Laws, who say, that a Taxation of Charges, without an Oath is void: Though Mr. *Clarke* saith, he never saw the case controverted,

verted, that is, as to the omiſſion of the Oath, upon the Taxation of theſe Charges, which are thus ſaid to be due, by the Style of the Court.

3. The Proctor or the Party Appellate, being to alledge that the Appeal is deſerted, muſt ſay on this manner; 'I 'do alledge that the pretended Appeal, interpoſed on the 'part of *N.* in this Cauſe, is deſerted, referring me to the 'Acts of this Court, and to the Laws: Wherefore I deſire, 'that firſt, and before all things, this Appeal may be Pro-'nounced for deſerted, and that the Cauſe may be remitted 'to the Judge from whence it was Appealed, together with 'the Charges. Then the other Party denieth theſe things, (ſo alledged by *M.*) to be true, and doth proteſt as to the nullity of them, and deſires that Sentence may be given in the Cauſe. Then the Judge aſſigneth to hear his pleaſure upon this deſertion, againſt the next Court day, and may likewiſe aſſign to hear his Sentence then too, if it be deſired of him, and if the Cauſe be not deſerted: And may ſo often aſſign to hear his pleaſure thereupon, until he be informed as to the Acts of Court, and the Law: And if the Appeal is deſerted, then muſt he Pronounce ſo, either with the Living Voice, at the Acts of Court, (which is called an Interlocutory Decree) or by his definitive Sentence: If it be by the Interlocutory Decree, then the Judge ſaith thus, 'We Pronounce the Appeal interpoſed by 'N. to be deſerted, and we remit the Cauſe to the Judge, 'from whom it was Appealed, together with Charges, and 'we condemn the ſaid Party Appealing, in thoſe Charges. And then a Schedule of Charges being offered, the Judge muſt Tax theſe Charges, and Decree a Monition, as was ſaid, when the Sentence is to be put in Execution.

4. Now although by the Law, a year be given, in which to Proſecute, and Determine an Appeal (which is called the *Primum Fatale*) yet the Judge from whom it is Appealed, may abbreviate this year, † as to the Proſecution thereof; and ſo ſoon as it doth appear to him, that an Appeal is interpoſed from his Sentence, he may appoint the Party Appealing, a time to Proſecute the ſame, if the Adverſary requeſt it: And like as the Appeal is deſerted, if the Party Appealing doth not Proſecute it, within the Term

† *De verb. ſig.* *a Sebaſt. Alm. verb. Apvellatio, Sect. 11. Ordo. Cam. p. 2. tit. 30. Mynſ. cent. 2. Obſ. 15. 22.*

allowed by the Law, for that purpose, so likewise, if he doth Prosecute the same within the Term appointed by the Judge for that purpose, it may also be said to be deserted. There may be many Causes or Impediments urged, in order to hinder this desertion, and get the time or the *Fatale Juris & hominis* Prorogued: Of which Causes was spoke at large, in the second paragraph of this Chapter, at the eighth number.

* *In the Courts of the Lord Arch-bishop of York, all Causes of Appeal have the same order and method in the proceeding, as Plenary Causes have, from the giving in of the Libel till Sentence. Lord Cholmondsley his Appeal, &c. and several others whether the said Appeals were Testamentary, i.e. Summary Causes or Plenary Causes in the first instance, as may appear by my Lord Cholmondsleys Appeal, and one Beesley against Sr. George Middleton of Richmond. 2 of August. 1664. Sute is contested, &c. Lanfranc. c. quoniam. de Interloc. & Appel. n. 88.*

5. Seeing the Laws do say, that an Appeal ought to be determined within the *Primum Fatale*, that is the first year, or otherways the same to be deserted. Therefore let the Proctor Appealing take care, (though he have Appealed in due time and place, and hath caused the Party Appellate, to be cited to answer in a Cause of Appeal, and hath got the proceedings, of the Judge from whom he Appeals, transmitted) that he insist, to have the Cause concluded, and to that end, that he often do call upon the Judge to Pronounce his Sentence thereupon, or else let him however protest his diligence in that behalf, which if he doth not, the Party Appellate may alledge that the Appeal is deserted, and the Judge ought to Pronounce upon that first Article of desertion.

6. After both the Party Appealing and the Party Appellate do appear by their Proctors, before the Judge to whom it is Appealed, the Party Appealing must (in their usual and ordinary form of words) give in his Libel, and desire that it may be proceeded summarily, *& de plano*. And in all things, it must be Decreed by the Judge, and requested by the Party, as above, where the Libel is given into Court, in the first instance, * this only being excepted, that before the assignment of the Term Probatory, the Party Appealing may desire that a Monition may be Decreed against the Judge, from whom it is Appealed, and the Writer of his Acts, to cause them to transmit before the Judge (to whom it is Appealed,) against such a day, the whole proceedings, and all things whatsoever acted and done (before the said Judge from whom, *&c.*) in the Cause; which the Judge Decrees, appointing a certain day for transmitting the said proceedings. Then the Party Appealing (or if he doth not, the Party Appellate) may ask

ask a Competent Term to be aſſigned to prove the ſaid Libel; to which purpoſe, the Judge appoints the Court day, following the ſame day, which was appointed for tranſmitting the proceedings. And here it is to be obſerved, that every Cauſe of Appeal retains the nature of the principal Cauſe, as it was Inſtituted before the Inferior Judge, and ought to be proceeded in the ſame method, as well in the Conteſtation of Sute, as in the Concluſion of the Cauſe, (*viz.*) Summarily in Summary Cauſes, and Plenarily in Plenary Cauſes: Though this falleth in Cauſes of Appeal, before the Kings Delegates, * for by the Kings Commiſſion, the Cauſe is ſo Delegated, that they may proceed Summarily in it. And theſe Judges were wont to proceed ſo always, though the Original Cauſes were perhaps Plenary.

* *Lanf. c. quoniam, n. 12. per tot.*

## SECT. 5.

1. *The manner of Exhibiting the proceedings of the Judge, from whom it is Appealed, before the Judge to whom it is Appealed: And Taxing the Charge of tranſmiſſion.*
2. *The manner of Compounding with the Regiſter of the Judge to whom it is Appealed, for inſpecting the proceedings.*
3. *The order in producing proofs in theſe Cauſes of Appeal.*
4. *The manner of Exhibiting the Inſtrument* † *of Appeal read before the Judge* ad quem *in preſence of the Proctor of the Party Appellate.*
5. *The manner of Exhibiting an extrajudicial Inſtrument, or one made out of Court.*
6. *What Solemnities are required, that a publick Inſtrument be made Authentick.*
7. *Who ought to keep the Appeal after it is read.*
8. *In what caſe an Inſtrument makes no proof, unleſs the contents of it be proved.*

† *Species Inſtrumentorum ſupra traditur in part. 3. Sect. 7. n. 2.*

THe proceedings of the Judge, from whom it is Appealed are to be Exhibited before the Cauſe is concluded, (*viz.*) ſome of the Proctors of the Court (if the Regiſter of the Judge from whom it is Appealed, be not preſent) who is not a Proctor in that Cauſe in which the proceedings are to be Exhibited, muſt (in a form of words) on the behalf of the ſaid Judge from whom, *&c.* and of the Writer of his Acts preſent theſe proceedings. Then the Proctor of the Party Appellate, or perhaps ſome other Proctor, who is particularly inſtructed by the Regiſter, is wont to take care, that the Judge do Tax theſe proceedings (that is) that he write at the end of them, what ſum the Party, at whoſe inſtance the proceedings were tranſmitted ought to pay to the Regiſter of the Judge, from whom it is Appealed, for the tranſmitting or writing the Proceedings, thus tranſmited: And then he muſt deſire a Monition may be Decreed againſt the Party Appealing, for the payment of the ſum Taxed, upon ſome certain day to be appointed by the ſaid Judge, ſo Taxing the ſame.

* *Panorm. abb. in Conſil. vol. 1. con. 2. Sect. Item etiam præmitto.*

2. Seeing an Appeal from Grievances, * ought regularly to be proved or juſtified, by the proceedings themſelves, and the Acts of the Judge, from whom it is Appealed; and although ſome matter, or Allegation were given (in a Cauſe of Appeal from a definitive Sentence) before the Judge to whom it is Appealed, by the Party Appealing, and the Party Appellate, and it is not known either to the parties in conteſt, or the Judge, which was firſt given in, and whether or no, Witneſſes were produced and examined upon ſuch matter, and their Sayings and Depoſitions publiſhed, unleſs by inſpecting the proceedings of the Judge from whom it is Appealed: And ſeeing alſo if the whole proceedings, are not truly and fully tranſmitted, or if they are vitiated or corrupt in any thing, (as it ſometimes falls out) then this cannot appear, unleſs the proceedings of the Judge from whom, *&c.* be inſpected: and becauſe alſo informations in matter of Fact, (that is, as to the manner of proceeding, and the things alledged, propounded, and proved, in the firſt inſtance) cannot be given by the

the Advocates of the Judge to whom it is Appealed, that ſo Sentence may be pronounced in the Cauſe, unleſs the proceedings of the Judge from whom, *&c.* be inſpected; leſt therefore the Parties, either Appealing, or Appellate, ſhould (to their great charge) be compelled to get theſe proceedings Writ out, or Exemplified, and leſt the Proceedings ſhould be ſtopped (in prejudice of the Parties in Sute) until the ſame be ſo Writ or Exemplified: Therefore to avoid theſe Charges, and the ſaid delays, the Parties are wont to compound with the Regiſter of the Judge, to whom it is Appealed, for an inſpection into theſe Original tranſmiſſions, on this manner (*viz.*) the Party Appealing (ſeeing the proceedings were tranſmitted up to this Superior Judge, at his charge) is wont and ought to pay for the inſpection, into theſe proceedings, a fourth part of the ſum Taxed (as is aforeſaid) for the tranſmitting the ſame: But the Party Appellate, becauſe he paid nothing for the tranſmitting the Proceedings, is wont to pay a third part of the ſaid ſum Taxed. And leſt the Party Appealing, (having taken care perhaps to get the proceedings aforeſaid, to be delivered to him) ſhould detain the ſame, ſo long in his cuſtody, ſo that the Party Appellate can ſcarce get opportunity to view the ſame; and ſo contrarily the Party Appellate, ſhould get them into his hands to peruſe, and doth keep them ſo long, that the Party Appealing has not an opportunity to peruſe them: Therefore the Proctors of the Parties ſo peruſing theſe tranſmiſſions, are wont to lay in a Bond to the Regiſter, (or a pawn, or ſome Teſtimonial under their hand, (*viz.*) a ſubſcription under their hand, in a certain Book kept by the Regiſter for this purpoſe,) that upon ſuch a day, ſuch a Proceeding was delivered to him, and that he will reſtore the ſaid Proceeding, when it is required of him: And if either of the Parties (being requeſted ſo to do) doth deny to deliver the ſame, the Judge is wont to deny Audience in the Cauſe, until it be done: And if he is Contumacious, and refuſeth peremptorily to do it, he ought to be Excommunicate for this his Contempt. Or if the proceedings are detained by any other Proctor, then the Judge is wont to ſuſpend him, from

Executing his Office as Proctor, in any Cauſe whatſoever, until he bring in theſe proceedings.

3. In a Cauſe of Appeal from a definitive Sentence, it is Lawful both for the Party Appealing, and the Party Appellate, to alledge things not alledged before the Judge, from whom it is Appealed; and to prove things not proved, ſo as the publication of the Witneſſes, produced in the firſt inſtance, hinder not. But it is otherways in a cauſe of Appeal from Grievances, which ought to be proved, by the Proceedings, and the Act of the Judge, from whom it is Appealed; unleſs the Grievances upon which it is Appealed, are omitted, and left out of thoſe proceedings ſo tranſmitted, or that the Judge, from whom it is Appealed, or his Regiſter, hath refuſed to enter theſe Grievances into the Acts, which the Party Appealing ſuppoſeth himſelf grieved upon.

† *Publica Inſtrumenta dividuntur in judicialia quæ videlicet fiunt apud acta & in judicio; quæ hic intendimus. Weſemb. parat. ff. de fide Inſtr. n. 2. col. 887. lit. c. de verb. ſignif. verb. Appellatio Sect. 17. à Sebaſt. Almers. Baldus. in rub. Cod. de fide Inſtr. n. 4, 5.*

4. Though the Appeal were read and interpoſed, before the Judge, to whom it is Appealed, at the time of granting the Inhibition, as is frequently done, when it is Appealed from an Excommunication, and this Appeal remaineth at the Acts † of Court (that is, in the cuſtody of the Regiſter of the ſaid Judge, before whom he Appeals) yet ſeeing it was read in the abſence of the Party Appellate, it is neceſſary that this Appeal be exhibited in Court, before the Cauſe be concluded, * in preſence of the Adverſe Party therefore the Proctor of the Party Appealing, muſt (in his uſual form of words,) acquaint the Judge, that in ſupply of the proof of the Contents of his Libel, already given in by him in this Cauſe, and alſo to found the Juriſdiction of the Judge of this his Appeal, he doth exhibit the Appeal already by him interpoſed in this Cauſe, and remaining at the Acts of this Court, that is in the cuſtody of the Regiſter. And obſerve that in this caſe, there is not any Allegation, or anſwer of the Proctor of the Party Appellate required.

* *Inſtrumenta uſq; ad concluſ. in Cauſa exhiberi poſſint. Weſemb. ubi ſup. n. 5. col. 893. lit. D. cap. cum dilectus, 6. de fid. inſtr. late Maranta in aureo ſpecul. judic. part. 6. n. 26. cum ſeq. Alciat. de Inſt. ed Sect. & quando ſint exhibenda.*

† *Weſemb. ubi ſupra. de verb. ſig. ubi ſupra, à Sebaſt. Alm. Sect. 17. & Sect. 15. ubi bene nota.*

5. Alſo before the Cauſe is concluded, the Proctor of the Party Appealing, ought to take care that this Appeal, (though made out of Court, † and read before a Notary publick, and drawn into the form of a publick Inſtrument, by the ſaid Notary publick, that is, being Exemplified by him)

him ) be exhibited, according to the uſual form, in ſupply of the proof of the Contents of the Libel, already given in by him in this Cauſe, and in order to found the Juriſdiction of the Judge to whom he Appeals: And he muſt alledge that the Notary publick, by whom this publick Inſtrument is ſigned, is an Honeſt and Lawful Notary publick, and that he is commonly reputed and taken for, and as ſuch an one, and that all and ſingular the premiſſes, acted and done, are true, and that it was Appealed, in manner and form, as is contained in the ſaid Inſtrument; which Allegation of his he muſt deſire may be admited, and that Juſtice may be done, *&c.* which being ſo admitted, and repeated in full force of its Poſitions and Articles, if the Proctor of the Party Appellate, doth not confeſs that this Inſtrument is Subſcribed, and ſigned by the Notary publick alledged, ( for the confeſſion of ſuch Subſcription, *&c.* of the Inſtrument by a Notary, proveth the Appeal to have been made as is therein contained. ) Then the Proctor of the Party Appealing, is wont to Swear, that he hath faithfully put this Allegation, and doth deſire that an anſwer may be given thereto, by the Proctor of the Party Appellate, againſt the next Court, upon his Oath: But if the Proctor of the Party Appellate, on the next Court day, doth deny theſe things thus alledged by the Appellant, or at leaſt, if he anſwereth that he believeth not the Notary, or rather that the perſon, ( whom the Party Appealing pretends to be a Notary publick ) is ſuch an one, then the ſaid Party Appealing, ought to prove whether he be ſo or not, which may eaſily be done by exhibiting the publick Inſtrument, obtained ( upon the creation of the ſaid Notary ) under the Seal of the Court of Faculties. Which publick Inſtrument, ſeeing the Seal put to it is very Authentick, and ſufficiently known to all the Proctors, the Proctor of the Party Appellate, is wont to own and acknowledge this Seal ( for no Honeſt Man can well deny it, ) and this Confeſſion is ſufficient for the Party Appealing, to prove that it hath been Appealed in manner and form as is Specified in the ſaid Inſtrument of Appeal. But if the Notary who Subſcribed this Inſtrument, hath been Notary for ten years together, and has been known

known to the Court and the Judge as ſuch ( having drawn ſundry publick Inſtruments of the like nature and exhibited them, and left them at the Acts of Court, of the ſaid Judge, or if he has been reputed as an Honeſt and Lawful Notary publick, for that time, ) it is ſufficient that the aforeſaid publick Inſtrument be exhibited by the Party Appealing, and that he do alledge as above, and that will make proof of it ſelf, without the Confeſſion of the Proctor of the Adverſe Party, nay although the ſaid Proctor doth deny both the Allegation and the publick Inſtrument aforeſaid : And this Mr. *Clarke* ſays he hath often ſeen and known practiſed, in Cauſes where he was concerned. And here the Proctors Appealing are to be admoniſhed, that though it be uſe, that ( when the Inſtruments of Appeal are exhibited ) the Party exhibiting this Inſtrument is wont to alledge, all and ſingular the things contained in the ſame are true, and were done and acted, as is therein expreſt, as before : Yet if that Inſtrument and Allegation, were denied by the Proctor of the Party Appallate, then the Proctor exhibiting this Inſtrument, and making this Allegation, may refuſe to take his Oath that he hath faithfully put this Allegation, and that all and ſingular the matters and things contained in the ſaid Inſtrument are true, and were ſo acted and done, as is there expreſt. However let the Proctors take heed for the future, how they alledge thoſe words laſt recited, eſpecially let them beware how they Swear as to the truth of them ; for the tenor of the whole Appeal, is wont to be inſerted in the ſaid Inſtrument of Appeal ; which if ſo, Mr. *Clarke* Appeals to their Conſciences whether or no, all the Grievances, the Iniquities, the Nullities and thoſe pieces of Injuſtice, inſerted in the ſaid Appeal, ( which they pretend are inflicted upon them, by the Judge from whom they Appeal) are true, that is, that they are really inflicted by the ſaid Judge, and impoſed as is contained in the ſaid Appeal ? And if they are not true ( as often falls out, ) then with what Conſcience, can this Oath be taken by the Proctor alledging the premiſſes, ( *Scil.* ) that he hath faithfully propounded the ſame, and that the things contained in that Inſtrument are true. Therefore for the future, let them omit thoſe general words, above

bove mentioned, and alledge only that the publick Inſtrument was exhibited, and is Subſcribed with the proper name, and the wonted Seal of *N.* the Notary: And that the ſaid *N.* was and is an Honeſt and Lawful Notary publick, and is commonly reputed and taken to be ſuch; and that the Appeal mentioned in the ſaid Inſtrument was made and interpoſed, before the ſaid Notary, in the Day, the Month, the Year, the manner and form Specified in the ſaid Inſtrument: And if as is above ſaid, the Proctor of the Party Appellate, do either confeſs that the Inſtrument is ſubſcribed by the Notary, as is alledged, or doth deny the ſame as before; yet if the Party thus alledging and exhibiting doth make appear that the perſon Subſcribing the ſaid Inſtrument, is a Notary publick, or that he hath ſtood in the ſtate of a Notary, for ten years together, as above, then the intention of the Party Appealing, is ſufficiently founded: *Viz.* that it was Appealed on his behalf in due time and place, in this buſineſs, and that the matters or things contained in this Appeal, ought to be juſtified by the Proceedings of the Judge, from whom it is Appealed, or otherways, as is ſpoke afterwards.

6. Now this Extrajudicial Appeal, or rather the Inſtrument * made upon an Extrajudicial Appeal, ought firſt to be directed to all faithful Chriſtians. 2. It ought to be drawn in the name of the Notary publick, before whom the matters contained in this Inſtrument, were acted and done. 3. The Year of our Lord, and the King, the Day of the Month, and the Place, (in which the ſaid matters ſo contained, were done and diſpatched) are alſo to be inſerted. 4. Witneſſes are to be preſent, at the time of diſpatching the premiſſes, whoſe names are to be Specified in this Inſtrument, with their uſual habitations, that ſo if theſe Inſtruments are doubted, the Witneſſes may be found. 5. The name and ſurname of the ſaid Notary, who draws this Inſtrument, ought alſo to be inſerted, and by what Authority he was created Notary, and where he was born; and if there are many Notaries of the ſame name, it ought to be Specified particularly, which of them it is, who hath Subſcribed this Inſtrument. 6. Alſo the Sign or Signet of that Notary, is alſo to be put to this Inſtrument: For every

* *De materia in qua debent Inſtrumenta ſcribi; in quaforma, & quæ ſolennitates requiruntur, plenius de hiſce reperias mentionem apud Weſemb. parat. ff. n. 4, 5. de fide Inſtrum. Alciat. prax. de Inſtr. editione. Sect. qual. publicetur, & quæ ad ſolenn. Inſtrumenti requiruntur, ſpecul. in tit. de Inſtr. edition. Sect. breviter. Lanf. c. quoniam de Inſtr. n. 5, 6, 7, 8. Angel. in Auth. de tabellion. Alexand. Conſ. 64. vol. 4. Ferra. in forma product. Inſtru. in princip. omnis ſolenn. hic recitatæ a D. Clarke latè enumerantur ab authoribus ſupradictis.*

every Notary hath ſome certain, and particular Seal, that by looking thereupon, although the Notaries hand be uncertain, yet it may appear by the Seal it ſelf, what Notary drew that Inſtrument. 7. At the end of this publick Inſtrument, the Notary is wont to teſtifie, that he was eſpecially requeſted to draw up this Inſtrument. 8. And Laſtly, He muſt alſo teſtifie, that the aforeſaid Witneſſes mentioned, were requeſted to give their Teſtimony: And it is expedient that the Notary take care, that the Witneſſes do put their hands to the Protocol of Appeal, (that is, the Original Appeal, which the Proctor reads and interpoſeth, and upon which this Inſtrument is made) that ſo if it be afterwards doubted, whether or no this Appeal were interpoſed, the Witneſſes having viewed their hands, may eaſily recollect, whether they were preſent at the premiſſes yea or not: And theſe Solemnities we are to underſtand, as peculiar to all publick Inſtruments.

7. But one Corruption (Mr. *Clarke* obſerves) hath crept in now adays; which is, that when the Proctors of the Party Appealing, do Appeal out of Court, before a Notary publick, after the Appeal is read, or interpoſed, they take care to get the ſame Subſcribed, and then take it into their own cuſtody, and keep it until they are neceſſarily compelled to Exemplify the ſame, into the form of a publick Inſtrument; by means of which their keeping it, they may eaſily add to, or Subſtract from this Appeal, in prejudice of the Party Appellate, which in all probability they could not do, if the ſaid Appeal were left in the hands of the Notary; nay it may alſo poſſibly injure the Party Appealing, when the ſaid Appeal is not left in the cuſtody of the Notary; for admit the Notary do die before this Appeal is Exemplified, and drawn into the form of a publick Inſtrument, how can a publick Inſtrument be drawn upon the ſame afterward? Whereas had this Appeal been found in the cuſtody of the ſaid Notary, amongſt his other Writings, and Inſtruments of the ſame nature, at the time of his death, then a publick Inſtrument might have been drawn upon it. For Notaries are bound, and are wont faithfully to keep all Writings, and things done by them: And it is to be noted that in ſuch caſe, where the

the Notary doth die as aforeſaid, ſome other Honeſt Notary, ( if he finds that this Appeal is faithfully kept as above, in the cuſtody of the Notary ſo dead, and doth know very well, the Hand-Writing, the Subſcription and the Signet of the ſaid Notary ) he may at the Petition of the Party concerned, Exemplify, and draw up a publick Inſtrument, touching the finding of this Appeal, Witneſſes being alſo requeſted to be preſent, at the time of looking for, or finding the ſame; which Witneſſes are alſo to be named in the ſaid Inſtrument: And this Inſtrument Mr. *Clarke* affirms is valid, and that he hath known it adjudged forty years ago.

8. If the Inſtrument wants any of the Solemnities † aforeſaid, it makes no proof, neither can it be ſaid to be publick, if it be raiſed or interlined, in any ſubſtantial matter, ( *viz.* ) in the names of the Parties, in the date of the Year, the Day or the Month; or if the Notary publick who drew this Inſtrument, be one of the Family, Houſhold, one Clothed by, or a Father, Son, or nigh of Kindred to the perſon interpoſing the Appeal, in whoſe favour the Inſtrument is drawn; this Inſtrument makes no proof of it ſelf, if the Adverſe Party deny it, and if the aforeſaid defects appear, by inſpecting the ſaid Inſtrument; or if the Adverſary do alledge, and prove, that the ſaid Notary who drew this Inſtrument, was not an indifferent perſon, for the Cauſes aforeſaid. Therefore leſt your Client ſhould loſe his Cauſe upon this account, ( if your Adverſary do prove the matters aforeſaid, objected againſt the Notary ) yet if it be true, that the ſaid Appeal was read and interpoſed in due time and place, then you muſt prove the ſame, ( as alſo the raſures, and interlineations aforeſaid, ) by the Witneſſes who were then preſent: And for this reaſon as is aboveſaid, it is very neceſſary, that the Witneſſes do Subſcribe their names, to the Protocol of Appeal. If the Notary at the end of the Inſtrument, doth teſtify that that, was done by him, and that he doth thereby make the ſame ſo appear, and doth proteſt himſelf ready ſo to do, that ſo all ſuſpition may be removed; in this caſe, all ſuſpition is removed, and credit is to be given thereto; but we muſt underſtand this as to a Lawful

† *Quibus Inſtr. fides ſit adhibenda, & quanta, & quæ exceptiones contra eadem oriri poſſint, plenè notatur in Authentic. de fide Inſtr. Sect. ſi vero moriantur ex. eo. c. ex literis. Alciat. de Inſt. ed. Sect. Quibus. Weſem. parat. ff. de fide Inſtr. n. 8. Speculator de Inſtrum. & Sect. repet. in princip. & Sect. oſtenſo. Ferrarienſ. in forma oppon. contra Inſtr. per tot. Lanf. in c. quoniam de Inſt. prod. n. 49. uſq; ad finem ubi bene nota de hac re, Schuſfius conſ. 56. cent. 1.*

ful Notary publick only: For it is otherways (as was ſaid before) in a Notary publick, who is not an indifferent perſon, for then the interlineations and raſures, are to be proved by the Witneſſes, otherways the Inſtrument availeth not.

## SECT. 6.

1. *In what caſe the Party Appellate, (though Sentence is given againſt him upon the Appeal) yet is not to be condemned in Charges.*
2. *In what caſe, and when there ought to be a compoſition of the Charges in theſe Cauſes.*
3. *The Judge of the Appeal, though he gave a Remiſſory Sentence, on behalf of the Appellate, yet may he after the Cauſe is remited, Tax Charges, and Execute his Sentence as to thoſe Charges.*
4. *The tenor of a Remiſſory Sentence, with a Condemnation, and a Taxation of Charges, and an Excommunication in the ſame, if the Party being admoniſhed, takes no care to pay the ſaid Charges.*
5. *The manner of Executing the ſaid Monition, and denouncing the Excommunication laid in the ſaid Sentence.*
6. *The manner of renewing the ſaid Decree to pay Charges, or the matter adjudged, by the Sentence.*
7. *It is Lawful to complain of the nullity of a Sentence, or any other nullity before the ſame Judge: Who if he revokes not that nullity, what remedy.*
8. *The nullity of a Sentence, or other Acts of the Superior Judge, may be alledged before the Inferior Judge.*

IF I obtain Sentence on my part in the firſt inſtance, by the depoſitions of the Witneſſes, who make full proof, of my intention, and if the Adverſe Party (having juſt exceptions unknown to me,) doth not prove them in the firſt inſtance, but in the ſecond; he ſhall not obtain the Charges expended, either in the firſt or ſecond inſtance. For it is ſufficient that he do obtain the principal Cauſe, and

and that he be excuſed from Charges, but it is otherways, if the Party Appellate doth give exceptions againſt theſe Witneſſes, and doth not prove them. Likewiſe if the Party Appealing, ſhall obtain a Sentence, upon new proofs (made in a Cauſe of Appeal) which reſpect not the merits of the Cauſe, he ſhall not obtain his Charges of the firſt inſtance; becauſe the Party who obtained Sentence in the firſt inſtance, is preſumed in good eſteem, and may inſiſt for the defence of the Sentence pronounced on his part. But this faileth, if the Party Appellate, were in bad eſteem in the beginning; that is, if that defence, which is proved by the Party Appealing, in the ſecond inſtance, were known before to the Party Appellate: To wit the payment of a Legacy, or the Tithes Sued for in the firſt inſtance, by the Party Appellant, in this caſe the Party Appellate, ought to be condemned in Charges made in both the inſtances, though he probably obtained Sentence on his part, in the firſt inſtance.

2. If the Plaintiff obtain Sentence in a Cauſe of Tithes, for a greater ſum, or for more Tithes, than thoſe which are proved, either by the Confeſſion of the Party, or the proofs of the Witneſſes, the Defendant hath juſt cauſe of Appealing, and theſe things being proved, he ſhall obtain Sentence in which Appeal, the firſt Sentence ſhall be retracted, as to theſe exceſſes; but as to the juſt Tithes, it ſhall be condemnatory: In this caſe therefore it ſeems, that ſeeing the Party Appealing had juſt cauſe for this his Appeal, he ought to have his Charges he is at about the Appeal, but not thoſe expended in the firſt inſtance: The reaſon is, becauſe he did not offer that ſum, or thoſe Tithes, which was really due, after the Sentence was pronounced in the firſt inſtance; and therefore he may be accounted malicious, and fraudulent, ſeeing he never offered that which was really juſt and due. And ſo on the contrary it ſeems, that the Party obtaining this Sentence, for a greater ſum then that which was juſtly due, and not renouncing this greater ſum, * ſo ſoon as he knew that it was Appealed (from the Sentence) by the Adverſary, but perſiſting in the Sute, he is alſo in fault, and may be ſuppoſed to ſtand Sute, out of an intention of Malice,

* *Plus petens olim cadebat in cauſa. Myns. Inſt. de Action. Sect. ſi qui. Quot modis quis dicitur plus petere, Sect. plus autem, ibid.*

Malice, and Injury, and ought therefore to be condemned in Charges; therefore in theſe caſes, a † compenſation of Charges is to be made, for both of them deſerve to be puniſhed. Let the Proctors therefore beware, in theſe caſes; (*Scil.*) the Proctor Appealing, that in the oppoſition, and proſecution thereof, he do proteſt expreſly, that he will acquieſce in the Sentence, as to ſuch Tithes, or ſuch a value, and that he only intends to Proſecute the Appeal, as to the exceſſes aforeſaid: And let him offer to the Judge from whom he Appeals, (or otherways before the Judge of this Appeal, at the firſt beginning of the Sute) the ſum due: Then let the Proctor Appellate, take care that (in the aforeſaid caſe) he do in the firſt place, and before all things, renounce the benefit of the aforeſaid exceſs either before the Judge from whom it is Appealed, (and that within ten days after the Sentence is pronounced, and in the preſence of the Adverſe Party) or before the Judge, to whom it is Appealed, upon the day of his firſt appearance, and then if the Party Appealing doth contend yet further, he is to be condemned in all the Charges.

† *De compenſ. vide Lanf. in c. quoniam, de expenſ. n.* 12, 13, 14. *ſi lata ſit Sententia Condemnatoria in centum, & victus Appellet, & judex Appellationis ſolum condemnet illum victum in quinquaginta, adverſar. ejus (Scil.) victor debebit condemn. in expenſis, quia inique ille victor petiit centum cum non deberet habere niſi* 50. *vide Gail. Obſ. pract.* 1. *Ob.* 152. *n.* 3. *Bald. in Authen. ſgener. c. de epiſc. & cler. Specul. in tit. de expenſ. Sect. nunc videndum.*

3. It is generally held, that the Judge to whom it is Appealed, ſo ſoon as he hath pronounced his Sentence, and hath remitted the Cauſe back to the Judge from whom it was Appealed, his office doth ceaſe, and is determined, and he doth ceaſe to be Judge in that Cauſe; and (unleſs in the ſaid Remiſſory Sentence, he hath Taxed Charges of Sute, and alſo in the ſaid Sentence hath alſo Pronounced the Sentence of Excommunication) that he cannot afterward Tax Charges and Compel the Party Appealing, to pay the ſame. Yet in this caſe Mr. *Clarke* ſaith, he hath had it adjudged againſt this opinion, (*viz.*) that although in the Remiſſory Sentence, or in the Interlocutory Decree aforeſaid, the Judge to whom it is Appealed, doth remit the Cauſe back, to the Judge from whom it was Appealed, and doth condemn the Party by the ſaid Sentence, in Charges, but doth not Tax the ſaid Charges, in that Sentence, but doth reſerve the Taxation * of them; yet may he afterwards Tax the ſame, and Execute his Sentence in that behalf: For if this is not Lawful in this caſe, then

* *Alciat. de expenſis, Sect. quando & qualiter expenſ. condemnatio ſit facienda. verſ. Alii vero ſenten. Lanf. in c. quoniam, de expenſ. n.* 6. & *num.* 21.

then admit that in caſe the Judge, by his Remiſſory Sentence doth Tax the Charges, and (a Monition preceeding for the payment thereof, upon ſuch a day) doth Excommunicate the Party Admoniſhed, and refuſing to pay the ſame, as well now as then, and contrarily. But the Party who ought to pay theſe Charges, doth ſo abſcond, that he cannot be Admoniſhed to pay the ſame, before the day which is appointed for that purpoſe is elapſed; in which caſe the Sentence of Excommunication aforeſaid, is almoſt extinct and determined. May not the Party to whom theſe Charges ought to be paid, go to the Judge again, and deſire this Monition to be renewed, and likewiſe deſire that a new Term may be appointed, for the payment of theſe Charges? Yes ſurely he may; and Mr. *Clarke* ſaith it is a thing daily practiſed. Obſerve that in the ſecond Monition, the Judge cannot Pronounce the Party to be Excommunicate, as well now as then; but an ordinary Monition is to be granted, as in other Monitions for Charges. Admit alſo that in this caſe of Excommunication Pronounced in the Sentence it ſelf, the Party be Admoniſhed to pay theſe Charges, and for not paying them, he is Lawfully Excommunicate, *&c.* and is committed to Priſon, by vertue of the Kings Writ, *de Excommunicato Capiendo*, ſo that the Party to whom theſe Charges are due, hath been at a great deal of further Charge, beſides the Charges Taxed: Cannot the Judge in this caſe Tax theſe Contumacy Fees, and compel the Party to pay the ſame, notwithſtanding the remiſſion aforeſaid? Mr. *Clarke* ſaith he may, and therefore he concludes as above, that notwithſtanding the ſaid reaſon, that the Sentence or Interlocutory Decree were Remiſſory, without the Taxation of Charges, the Judge may Tax the Charges of Sute, and Execute his Sentence in that behalf, ſo as in the ſaid Sentence or Decree, he hath condemned the Party in Charges. But here it may be enquired, in whoſe preſence theſe Charges are to be Taxed, for the Proctor of the Party Appealing, hath Executed his office, and it is determined, ſo ſoon as the Definitive Sentence is Pronounced. Therefore the Party condemned, is to be called * to ſee the aforeſaid Charges Taxed; and then if he do not appear,

* *Solvitur hæc queſtio a Lanfran. c. quoniam, de expenſ. n. 8.*

they are to be Taxed in Penalty of his Contempt. Mr. *Clarke* ſaith, that he hath had it adjudged thus in this caſe, (*viz.*) that though the Sentence were Remiſſory, with a Condemnation of Charges, but without a Taxation in the ſame, and that if the Judge by the ſaid Sentence, or Interlocutory Decree, hath reſerved this Taxation of the Charges, until ſome certain day, and this without any interval, and under one context of words, (*viz.*) 'We 'condemn *N.* in Charges, and we reſerve the Taxation 'of them, until the next Court day, and we remit the 'Cauſe back to the Judge from whom it was Appealed' and hath alſo Admoniſhed the Proctor of the Adverſary to be preſent, to ſee theſe Charges Taxed, and a day aſſigned for the payment of the ſame, that then on that day ſo aſſigned, the Judge (in the preſence of the Proctor if he appear, or otherways in Penalty of his Contempt,) may Tax theſe Charges, † and Decree a Monition for the payment of the ſame.

† *Lanfranc. ubi ſupra. n.* 8.

4. If the Party Appealing do ſuffer in the Cauſe, whether by the Acts of the firſt, or the ſecond Judge, becauſe the Proceedings are not tranſmitted, as falls often out, or becauſe the Appeal is deſerted, the Judge muſt firſt Pronounce that the Party Appealing hath made default in the proof of his Libel, and hath unjuſtly Appealed, *and ſhall confirm the Sentence of the Judge, from whom it was Appealed, if the Proceedings are tranſmitted. For the Judge ought to Pronounce upon what he knows, and the Proceedings not being tranſmitted, he cannot have cogniſance thereof: He muſt alſo remit the Cauſe back to the Judge from whom it was Appealed, and condemn the Party Appealing in Charges, and Tax thoſe Charges in the ſame Sentence, and Decree. That the Party condemned, may be Admoniſhed to pay thoſe Charges againſt ſuch a day, to be appointed for that purpoſe, under Penalty of the Sentence of Excommunication under this form of words; 'We con-'demn the ſaid *N.* the Party Appealing in Lawful Charges, 'made in this Cauſe, and to be made and payable by Law, 'on the behalf of *M.* the Party Appellate, and we Tax the 'ſaid Charges, to ſuch a ſum, (let the Proctor take care that Faith be made upon the Taxation of theſe Charges,) 'and

* *Lanfranc. ubi ſupra. n.* 90. *qualiter debebit judex pronunciare? Si velit confirmare primam Sententiam, debet pronuntiare bene judicatum, & male Appellatum, &c.*

'and we Decree, that the ſaid *N.* ſhould be admoniſhit to 'pay the ſaid Charges before ſuch a Day or Feaſt, to the 'ſaid Party Appellate; and if in caſe he doth not obey this 'our Monition, within the ſaid Term, we Excommunicate 'the ſaid *N.* (this our Monition preceeding, and his Con-'tempt following) in Writing, by this our Definitive Sen-'tence, and do Decree him ſo to be Excommunicate, as 'well then as now, and now as then, *&c.*

5. Then the Proctor who obtaineth this Sentence, muſt procure a Monition for the payment of theſe Charges, which Monition muſt alſo contain the Excommunication, or letter Denunciatory, which muſt be duly Executed, upon the Party ſo Condemned in Charges, (that is, the Party muſt be Admoniſhed to pay the ſame, againſt a day appointed, under Penalty of the Sentence of Excommunication Pronounced againſt him, in caſe he pay them not.) And if the ſaid Party takes no care to pay the ſaid Charges, within the Term or Day appointed, then the letters of Excommunication, which are to be denounced, muſt be given to the Miniſter of the Pariſh Church, where the ſaid Party Inhabits, who muſt denounce the ſame, and make a Certificate thereupon, as was ſpoken before concerning Excommunications: And if he perſeveres in this State of Excommunication, forty days and more, he is to be ſignified to the Kings Majeſty, and the Kings Writ is to be obtained, in order to the apprehending him, *&c.*

6. If the Party obtaining this Decree, in the caſes aforeſaid, takes not care (through his negligence or otherways) to Execute the ſame in due time, (to wit, upon ſome of the days within the time aſſigned for payment) or perhaps after it is Executed, doth not take care to certifie of its Execution, ſo that the Certificate upon its Execution is diſcontinued, then the Proctor muſt acquaint the Judge and alledge that this Decree, already taken forth to ſuch an effect, is periſhed without any ſucceſs, and therefore he muſt deſire that this Decree may be renewed, and that the Party may be Admoniſhed again, to pay the aforeſaid Charges, or elſe to appear, *&c.* which Petition the Judge Decrees.

7. Though the Party grived by any nullity, may com-

plain thereof, before a Superior Judge, becauſe he is the Ordinary Judge for all Cauſes whatſoever, and hath knowledge in Cauſes, as well of Appeals, as Quereles: Yet may he if he will, go to the ſame Judge, by whom he is grieved, and alledge this nullity before him, and the Judge (the nullity being made appear to him) ought, and is wont to revoke the ſame, which if he doth not, then is juſt Cauſe given for an Appeal. For example, if any Judge Pronounceth a void Sentence, (that is, where the Adverſe Party is abſent, or where the Witneſſes produced in the Cauſe were not received, or in a Plenary Cauſe, when the Sute is not conteſted) the Party againſt whom this Sentence is Pronounced, (if he is called to ſhew Cauſe why the Sentence already laid, may not be put in Execution) he may alledge this nullity, ſpecifying the ſame particularly: For a general allegation, that the Sentence is null, is of no effect unleſs the Party ſo alledging, doth ſpecifie this nullity.

8. It is not Lawful either to Appeal, or to Complain by way of Appeal, from a Superior Judge to an Inferior; yet if in any Cauſe, depending before an Inferior Judge, any Sentence Pronounced, or any Act done, is objected before the Superior Judge, in order to hinder your intention or to confirm the intention of your Adverſary, you may alledge and object this nullity: And if you prove it, the Inferior Judge (though principally he had not cogniſance of this nullity) yet he ought ſo to Pronounce, and adjudge in the Cauſe, like as if this void Sentence or Act, had not been exhibited before him, and he may Pronounce ſo tacitly concerning this nullity.

CHAP.

# CHAP. II.

## *The manner of Proceeding in Cauſes of Appeal from a Sentence.*

### SECT. I.

1. *Of an Appeal from an Interlocutory Decree, which hath the ſame force and power with a Definitive Sentence.*
2. *In what caſes it is expedient to Appeal at the time of Pronouncing Sentence.*
3. *In what caſes it is not convenient to Appeal at the time of Pronouncing Sentence, and how the Party (againſt whom it is Pronounced) muſt proteſt to Appeal, and accept the ſaid Sentence in part, or ſo far as it makes on his part.*
4. *The manner and order of a Judicial Appeal, from a Definitive Sentence, which is called an Appeal at the Acts of Court.*
5. *The various form of drawing an Appeal, either from a Definitive Sentence, or an Interlocutory Sentence, in reſpect of the Party that Appealeth.*
6. *The order of Proſecuting an Appeal, from a part of the Sentence only.*

FRom every Interlocutory Decree, † having the force of a Definitive Sentence it is Lawful to Appeal, either *viva voce*, at the Acts of the Court of the Judge who Pronounceth the ſame, or within fifteen days after, in Writing before a Notary: But yet in Appeals from theſe Interlocutory Decrees, which have the force of a definitive Sentence, Mr. *Clarke* ſaith that in his practice, (and ſo he ſaith, he has known other skillful practitioners do)

† *Regulariter à Sententia Interlocutoria non poſſit Appellari. hæc vero regula limitatur a Lanfr. c. quoniam, de Appel. n.* 68.

* *Quænam constituunt differentiam inter Appellationes a Sens. defin. & Interlocutoria, plenè enumerantur à Lanfranc. in loco prædicto n. 69. 61. & inter casdem diff. notum fecit quod ab interl. debet Appellari in scriptis & sic de inceps usq; ad n. 77. Chilianus in pract. c. 105. & 106. Wesemb. parat. ff. de Appel. & interloc. colum. 1724. lit. A. Reinhard. diff. jud. 35.*

he rather chose to Appeal in Writing * than at the Acts of Court, because that in Writing he could so specifie the Fact, and declare that Fact in which the grievance is inflicted, from the preceding Acts, and draw forth that grievance, from which it is Appealed, so to the life, that it may appear evidently that the Judge hath inflicted a grievance; which could not so easily be made appear, if it were Appealed at the Acts of Court from a grievance. Besides, by this Appeal, thus interposed in Writing, a Libel may be drawn without much difficulty: For a Libel in an Appeal from grievances, ought to be conformable to the rescript, that is, the Inhibition, and the Inhibition again to the Appeal; because in the Inhibition or Rescript, is contained the true tenor, and effect of the Appeal. And although it is said above, that every Appeal ought to be interposed within fifteen days, from the time of the Sentence Pronounced, or the grievance inflicted, yet this is to be understood, only where the Party hath notice, or knowledge of it, for otherways not; for the time of Appeal is current from the time of your knowledge or notice, *&c.* for if a Sentence is Pronounced, or an Interlocutory Decree, (which hath the force of a Sentence) which is null (*Scil.* being made in the absence of the other Party, not Admonished as above) is interposed, then is it Lawful to Appeal, or complain of its nullity, (either before the same Judge or before a Superior) within fifteen days, after he has any notice of the same.

2. If a Sentence is Pronounced in a Matrimonial Cause, against the Plaintiff, by which the Defendant is Absolved from the Petition of the Plaintiff; it often falls out that the Defendant supposing by this Sentence, that it is Lawful for him to contract Matrimony with some other doth often times so contract it, and get the same Solemnized. Likewise if two Clergy Men contend about a Benefice, and Sentence is Pronounced, that such an one of those two shall be Instituted and Inducted; in pursuance of which Sentence, the said Clergy Man doth get himself Inducted, or at least Instituted to the same within the time allowed the Adverse Party for an Appeal; in like manner also, if it is contested in the Prerogative Court, about a Will

Will, and the Judge doth Pronounce Sentence for the Will: Or if it is conteſted about the granting of an Adminiſtration, and the Judge doth by his Sentence, commit the Adminiſtration to either of the Parties in Sute; the Executor or Adminiſtrator (under colour of theſe Sentences, and whilſt the delay or time given for an Appeal doth depend) is wont to intermeddle with the Goods of the Deceaſed, and to alienate the ſame, and ſometimes to releaſe Debts, and commence Actions at the Common Law, for the recovering Debts. In all theſe caſes, it is expedient for the Party, againſt whom the Sentence is Pronounced to Appeal immediately at the Acts of Court, as in the fourth number next following. For if at the time of Pronouncing the Sentence in a Matrimonial Cauſe, you do Appeal; and the Party who obtained this Sentence, (notwithſtanding this Appeal) doth Marry ſome other; the Parties Solemnizing this Marriage, are to be ſequeſtred; or ſeparated by the Judge of this Appeal, in the firſt place, and are alſo to be Canonically puniſhed as Contemners of the Eccleſiaſtical Juriſdiction, as much as if the Marriage had been Solemnized againſt the Judge his command, and whilſt the Sute were depending: Therefore in this caſe the Party Solemnizing this Marriage, cannot pretend himſelf ignorant of ſuch a judicial Appeal, ſeeing it was interpoſed in the preſence of his Proctor; which otherways he might have pretended, if the Appeal had been extrajudicial, or made out of Court. Likewiſe, if in a beneficial Cauſe the Clergy Man who obtained Sentence, (knowing that it is Appealed from the ſame, at the time of the Sentence) doth endeavor to get himſelf Inſtituted and Inducted; this Inſtitution and Induction is reckoned amongſt the things or matters attempted, and as ſuch is to be revoked, firſt of all, by the Judge to whom it is Appealed. Likewiſe in Teſtamentary Cauſes, and thoſe about Adminiſtrations, if it be judicially Appealed in the ſaid Cauſes; both the Parties who poſſeſs the Deceaſeds Goods, and alſo thoſe who owe the Deceaſed any thing, upon Bond, may keep the ſame in their hands, whilſt this Appeal doth depend without any dammage, though an Action be commenced againſt them for the ſame, by him who obtained the Sentence. Be-

cauſe that by this Appeal, all the force and effect of the ſaid Sentence is ſuſpended (until this Appeal be ended) as much as if no Sentence at all had been Pronounced.

3. If the Party againſt whom the Sentence is Pronounced, doth beleive, that if he Appealeth at the Act of Court, the Judge (being offended at him Probably, becauſe he hath Appealed from him) will aſſign him, two ſhort and incompetent Terms, or times for the Proſecution, and Certifying the Appeal, thus interpoſed by him; ſo as that within that time he cannot Proſecute the ſame, nor give his Client an account of the Pronouncing this Sentence, nor be informed of his reſolution, whether he will acquieſce in this final Sentence, or Proſecute the Appeal already interpoſed. In this caſe, it is not convenient that he do Appeal at the Acts of Court, at the time of Pronouncing this Sentence, but rather in Writing, before a Notary publick, within ten or fifteen days (at the moſt,) after the ſame is Pronounced: For in this caſe the ſaid fifteen days (aſſigned for an Appeal, by the Statutes of this Realm) being elapſed, the Party Appealing is to be called, or rather, he is wont and may be called, (becauſe the Party for whom the Sentence was given, is deſirous to have the ſame put in Execution) to ſhew cauſe why the Sentence may not be put in Execution, before the Judge from whom it is Appealed, can aſſign the Party Appealing a time to Proſecute, and Certifie this his Appeal. Alſo if Sentence is Pronounced in a Cauſe of Tithes, and you Appeal from the ſame, at the time of Pronouncing thereof, the Judge may immediately (by vertue of the Statute,) put his Sentence in Execution, as to the Charges, and may Tax the ſame, notwithſtanding the Appeal, and the Inhibition of the Superior Judge. If therefore you do Appeal from this Sentence, out of Court, in Writing before a Notary publick, the aforeſaid Sentence as to thoſe Charges, is not to be put in Execution, unleſs (as is ſaid above) the Party againſt whom the Sentence is Pronounced, be firſt called to ſhew Cauſe why the ſaid Sentence may not be put in Execution; and unleſs the Party Appealing (if he appears) doth alledge that it is Appealed. The Party Appealing thus extrajudicially, or out of Court, hath alſo

this

this advantage, (*Scil.*) he may give his Client a certain account, of the Pronouncing the Sentence, and of the Appeal which is interpoſed, and may receive full ſatisfaction from him, whether or no he ſhall Proſecute this Appeal, and whether or no he ſhall interpoſe another, if the Charges are Taxed, to over great a ſum. Yet if in the aforeſaid caſes, you do not Appeal at the time of Pronouncing the Sentence; it is very requiſite however, that you ſhould diſſent from the ſame at that inſtant (and proteſt as to the nullity of it, and of a Grievance, and of your intention of Appealing from the ſame, within the time limited by the Law for that purpoſe) leſt otherways, you ſhould ſeem to acquieſce in this Sentence, but if this Sentence doth make partly for, and partly againſt you, (*viz.* becauſe the Charges either are not Taxed in the ſame, or perhaps, becauſe the Party for whom the Sentence is Pronounced, is condemned in Charges, made on your part, as falls out ſometimes in Matrimonial Cauſes; then is it more ſafe for you, to accept the ſaid Sentence, ſo far as it makes on your part, eſpecially in as much as it is condemnatory, or condemning the other Party, to pay Charges to your Client, *&c.* and you muſt acquaint the Judge alſo, that you do acquieſce in the ſaid Sentence ſo far as it makes for the intention of your Client, but in all things elſe diſſent, and proteſt (as before) of the nullity, *&c.* of a Grievance, and of Appealing, *&c.*

4. The Party againſt whom Sentence is Pronounced, may (at the very ſame time of Pronouncing it, and before the Judge doth proceed to other things) Appeal with the living Voice, * or by word of mouth, delivered and ſpoke at the Acts of Court before the ſaid Judge who doth Pronounce the Sentence, (who is called the Judge, from whom it is Appealed.) And this Appeal he may interpoſe, in manner and form following. (*Viz.*) *I do diſſent from the Pronouncing of this Sentence, and do proteſt as to the nullity thereof, and of Appealing* (*from the ſame* (ſalva veſtra reverentia Domine judex) *as Null, Invalid, Injuſt, and as ſuch Pronounced*) *to Our Illuſtrious Prince and Soveraign*, CHARLES, &c. *and to his Court of Chancery. And here I do ſo Appeal to our ſaid Soveraign Lord the King, in his Court of Chancery;*

* *Lanfranc. c. quoniam de Appel. n.* 49. *quia dicatur inconſtienti vel illico Appellare.*

*Chancery; and I do desire that the Apostles may be given to me, and to my Client with effect, with all speed imaginable,* (for unless the Apostles be asked, the Appeal availeth not.) *And of this nullity, I do also equally and principally complain to, and require you, the Notary publick* (that is, the Register, or Writer of the Acts) *to draw me a publick Instrument, upon the Appeal, thus by me interposed, and I desire the Witnesses here present, to give their Testimony upon the premisses,* &c. The Writer of the Acts, ought to insert the names of the Witnesses, (into his Act which is made, upon the Pronouncing of every Sentence) which are present when the same is Pronounced.

5. Seeing (as was said above, of an Appeal from an Interlocutory Decree) it is Lawful to Appeal (either from a Definitive Sentence, or from any Interlocutory Decree, which hath the force of a Definitive Sentence,) at the Act of Court of the Judge, by word of mouth, at the time of Pronouncing the Sentence, so also (as was said before) is it Lawful to Appeal in Writing, within fifteen days, before a Notary publick and Witnesses. Therefore in these Appeals in Writing, from Definitive, or Interlocutory Sentences, if the Sentence is Pronounced against the Plaintiff, the Party Appealing is wont to declare in his Appeal, that such a Judge, in such a Cause, and betwixt such and such persons, Pronounced a pretended Definitive Sentence, for the part of *N.* against the said *M.* by which among other things, he hath dismissed the aforesaid *N.* the Defendant, from the Instance and Petition of the said *M.* as to the things alledged, and related in the Libel given in on the part of the said *M.* and hath also Condemned him in Charges † made or pretended to be made, on the part of the aforesaid *N.* the Defendant. But if the Sentence is Pronounced against the Defendant, then the Appeal is to be drawn on this manner; (*Scil.*) that such a Judge, *&c.* (as above) by which, amongst other things he hath Condemned me, not only in a certain pretended Legacy, or in certain Tithes, but also, in certain pretended Charges, *&c.* and although the Parties Appealing, (not only by the modern, but also by ancient practice) are not wont to declare, or specifie many things, (in the

† *Si judex absolvit victum ab expensis an sit gravam. Lanfr. c. qtion. n. 10. 15. de expensis, & n. 14.*

the aforeſaid caſes) in their Appeals more than what are above recited; yet I think it very convenient (ſaith *Clarke*) for thoſe Parties ſo Appealing, to add and ſpecifie theſe things or matters following. (*Viz.*) If the Plaintiff Appeal, then is it requiſite that he ſay in his Appeal, that he hath ſufficiently proved * the Libel, given in on his part, notwithſtanding which, the Judge Pronounced the Abſolutory Sentence as above. If the Defendant Appeal, then is it requiſite that he add in his Appeal, that although the Plaintiff made default, in the proof of his Libel; yet the Judge Pronounced a Sentence, Condemning him in a Legacy or in Tithes, as before. What things are to be inſerted in Appeals, from an Interlocutory Decree, is ſpoke at the firſt number of this Chapter.

* *Forma iſtæc, non eſt ignota, in omnibus fermè Appellationibus in Curiis Archiepſ. Eborac. ita fecerunt mentionem in ſuis Protocollis, ſicut etiam in Curiis Epiſcop. Suffraganeorum, ubi eſt Appellatum in Scriptis.*

6. If it is Appealed in general, from the whole Sentence, the Party Appellate may adhere to the oppoſition of his Adverſary, and may uſe the benefit thereof, (though he do not altogether Appeal from the ſame) to wit, becauſe the Judge hath not Condemned the Party Appealing in Charges, or in the caſes under Writ. And if it doth appear before the Judge of the Appeal, that the Judge from whom it is Appealed, ought (by thoſe proofs made before him) to have Condemned the Party Appealing, in more Tithes or in a greater value for the Tithes, or in a greater ſum for the Legacy Sued for; the Party Appellate (as to thoſe things that is, as to greater Tithes, or a greater value, *&c.*) ought to obtain a Sentence for them, before the Judges, to whom it is Appealed. The like may be done alſo, if in the Appeal, the Party Appellate doth prove that there is a greater ſum due to him, than that which is contained in the Sentence of the Judge, from whom he Appeals. But in thoſe caſes wherein it is Appealed, becauſe the Judge doth Condemn the Plaintiff, (who obtains the Sentence) in Charges, or doth not Condemn the Adverſe Party in Charges, and the Party Appealing doth acquieſce, as to the reſt, (*viz.*) as to the principal Cauſe: In this caſe unleſs the Party Appellate do alſo Appeal from the Definitive Sentence, and doth Proſecute the ſame; he cannot uſe the benefit of the aforeſaid limited Appeal, nor adhere to the Appeal of his Adverſary

versary, seeing he acquiesced in the Sentence, and it is sufficient for the Party Appealing in those cases, to prove that the Sentence was Pronounced on his part, and against the Adverse Party. And from thence comes that general conclusion, *Quod Victus Victori Condemnabitur in expensis.* † For the better understanding Mr. *Clarkes* meaning in this, I desire the Reader to look over Mr. *Clarkes* practice, his Title *de Prosecutione Appellationis à parte Sententiæ tantùm.*

† *Lanfranc. c. quoniam de expensis n. 2.*

## CHAP. III.

### *The manner of Appealing, and Prosecuting Appeals from Grievances.*

### SECT. I.

1. *What an Appeal (from Grievances) is.*
2. *The manner of proceeding in a Cause of Appeal, from Grievances.*
3. *In what cases it is requisite that the Party Appellate do confess the Grievances to avoid Charges.*
4. *In an Appeal from a Grievance, that is laid in a Cause of correction, the Judge from whom it is Appealed may be cited to appear to answer in a Cause of Appeal though it be not Appealed particularly as to him.*
5. *The Party Appellate, in a Cause of Grievance may proceed in the principal Cause, whether the Appellant will or not, (the Grievance not being discussed, nor the Charges paid) unless the Grievances are justified in the end of the Sute.*
6. *At whose Charge the Proceedings of the Inferior Judge must be transmitted, if the Grievances are confessed.*

* *Appellari potest a Gravamine illato. Lanf. c. quoniam de Appel. n. 60. vers. unde in casu non.*

AN Appeal from a Grievance * is said to be, when an Inferior Judge, to wit, the Bishop of any Diocese within the Province of *Canterbury*; or his Official or Vicar

Vicar General, or Commiſſary in any part of his Dioceſe or an Arch-deacon, or his Official do inflict any Grievance, † before the Sentence is Pronounced, (to wit) by rejecting Witneſſes, which ought by Law to be admitted, or by not admitting a matter or Allegation, which is concluſive, or the like: So alſo on the contrary, by admiting Witneſſes and matters, which are not by Law to be admitted: But in theſe Appeals from Grievances, the ſaid Grievances from which it is ſo Appealed, ought to be expreſt particularly. * For it is not ſufficient to ſay, that in ſuch a Cauſe the Plaintiff or Defendant produced Witneſſes, and the Judge refuſed to admit them, or he gave a concluſive matter or Allegation, which the judge rejected, but in this his Appeal he ought to inſert the names of the Witneſſes, and the things contained in the matter rejected, and ſo likewiſe he ought to do in all Appeals that are made from Grievances, or elſe the Appeal avails nothing. And obſerve that all Appeals from Grievances, ſo as they be not ſuch as have the force of a Definitive Sentence, ought not to be interpoſed *viva voce*, or by word of mouth, at the Acts of Court, but in Writing before the Judge himſelf, or if he cannot conveniently meet with him, then before a Notary † publick, and Witneſſes, and that within ten days. For it may be doubted, whether or no the Statute, which limits fifteen days for the time of interpoſing Appeals, take place as to thoſe Appeals which are interpoſed upon Grievances, or only from Definitive Sentences, and thoſe Interlocutory Decrees which have the force of Definitive Sentences: Yet in theſe caſes, it is very often wont to be Appealed after ten days, and within fifteen. See the Statute 28. *Henry* the Eighth Chap. 19.

† † *Hæ vocantur interjudiciales Appellationes. Weſemb. parat. ff. de Appell. n. 5. Johan. Ananias ſuper. 50 decret. de hæret. c. vergentis circa finem.*

* *Hoc certè innuitur ex eo quod dicitur de decreto interlocutorio, de quo vide notat. in Marg. in Sect. preceden. n. 1.*

† *Vide notata in Marg. in Sect. preced. n. 1.*

2. In theſe Appeals you muſt proceed in all things, as in a Cauſe of Appeal, from a Definitive Sentence, as to the conteſtation of Sute; the concluſion in the Cauſe and the other judiciary and ordinary Acts: For a Cauſe of Grievance as to thoſe things, doth follow the nature of the principal Cauſe; (that is, if the original or principal Cauſe were Plenary or Summary, the Cauſe of Appeal is ſuch alſo) except that in a Cauſe of Grievance, it is not Lawful to alledge things already alledged, nor to prove things already

already proved, as in Cauſes of Appeal from Definitive Sentences: For the Griveances are to be juſtified by the Acts of Court, † of the Judge, from whom it is Appealed; unleſs the Grievances were omitted out of the proceedings, or unleſs the Regiſter would not inſert into the Acts of Court, thoſe things deſired by the Party Appealing (*viz.* the admiſſion of his matter *&c.*) or unleſs it be Appealed from threatning words, uttered by the Judge in Court, or unleſs it do not appear by the Acts of the Judge, that the Party Appellate, (that is, he at whoſe Petition, the Office of the Judge is pretended to be Promoted) hath Sollicited the Judge to Proceed in that Cauſe of correction of his mere Office; although the Appellate, doth really promote the ſaid Office. For in theſe caſes of correction, the Parties Appealing, are often wont (out of favour and reſpect to the Judge) to cite and proceed againſt the Promotor of the Office of the Judge, and not againſt the Judge himſelf: But if by the Acts of the Judge, from whom it is Appealed, it doth not appear, or is not manifeſt, that the Griveances impoſed, (and from which it is Appealed) were impoſed at the inſtance of another perſon: In this caſe the Proctor Appealing ought to take care that in the firſt Inhibition, he obtain a Citation againſt the Judge, (from whom it is Appealed) to anſwer in a Cauſe of Appeal. The reaſon is, becauſe the Party Appealing is oftentimes Grieved with great Charges, in proving that there was another Promotor of the Office of the Judge. And if he doth not prove this directly, the Party Appellate is to be Abſolved with Charges, though the Judge might probably proceed unjuſtly, and illegally in the Cauſe: Whereas it is otherways if you make the Judge, from whom you Appeal, a Party in this Appeal: For then if either any injuſtice or nullity do appear by the Proceedings tranſmitted, the Party Appealing will obtain Sentence againſt the Judge with Charges, as in the fourth number following. And it ſeems very Conſentaneous to equity, that the Judge ſhould undergo the Penalties, and pay the Charges, if he doth proceed injuſtly in the Cauſe, when his Office is voluntarily promoted: For admit any thing that was injuſt were requeſted of the Judge, yet he ought to

† *Panorm. Conſil. pars. 1. Conſil. 2. Sect. Item etiam præmitto.*

to Decree right, and if the Party Appealing do either by the proceedings of the Judge, from whom it is Appealed, or by other proofs, in the aforeſaid caſes, ) prove his intention, he ſhall obtain Sentence with Charges: And the Party Appellate, if he were Plaintiff in the firſt Cauſe, he ought to Proſecute the ſame, before the ſaid Judge, to whom it is Appealed: Which if he is unwilling to do, the Party Appealing may alſo obtain an Abſolutory Sentence, in the principal Cauſe, with Charges.

3. If the Party Appellate doth believe that the Party Appealing hath Appealed juſtly, it is expedient (to abbreviate Sutes, and avoid Charges ) that the ſaid Appellate, ( at the time of relating the Inhibition ) do confeſs the Grievances Specified in the Inhibition, or in the Libel ( if it be given ) and that he conſent that it may be proceeded in the principal buſineſs, and alſo that he offer Charges which are made upon that account: For the Party Appealing is not obliged to proceed in the principal Cauſe, ( if the Grievances are confeſſed ) unleſs the Charges of this Grievance are firſt paid: Which being done, if the Party Appealing were Plaintiff in the firſt inſtance, he ought to be requeſted to proceed in the principal Cauſe, according to the form of the late Acts, had and made before the Judge, from whom it is Appealed; and if the Party Appellate were Plaintiff in the firſt inſtance, he may proceed in the principal Cauſe, whether the Party Appealing will or not; becauſe the Party Appealing, by this his Appeal, hath conſented to the juriſdiction of the Judge, to whom he Appealeth, and hath made him Judge of his Cauſe.

4. In every Appeal from Grievances, eſpecially in a Cauſe of correction, the Grievances are ſaid to be impoſed, as well of the mere office of the Judge, ( from whom it is Appealed ) as alſo at the inſtance of *M.* and *N.* yet the Parties Appealing in theſe caſes, ( out of reſpect to the Judge ) are wont to deſire a Citation to be Decreed, againſt the ſaid *M.* and *N.* (and againſt the Judge,) to anſwer in a Cauſe of Appeal: Yet if in the proceedings tranſmitted, it doth not appear that the Grievances, from which it is Appealed, were laid or impoſed, at the inſtance of a Party, but of the mere Office of the Judge, the Party Appealing

pealing in this caſe may deſire the Judge to whom it is Appealed, ( after Sute is conteſted with the Party Appellate ) to Decree a Citation againſt the Judge, from whom it is Appealed, to anſwer in a Cauſe of Appeal: And if he appear, the ſaid Party Appealing muſt give in a new Libel, and immediately exhibit the proceedings of the ſaid Judge, ( *viz.* the ſaid inferior Judge ) and tranſmitted by him, in the ſaid Cauſe, and betwixt the ſaid Parties: And in preſence of the ſaid Inferior Judge, or his Proctor, the aforeſaid Party Appealing muſt proceed to Sentence in the Cauſe. And if the Judge from whom it is Appealed, cannot juſtifie his proceedings, the Party Appealing is to be Abſolved, ( as to thoſe matters, or things laid againſt him ) by the Abſolutory * Sentence of the Judge, to whom he Appeals: And the ſaid Inferior Judge from whom he Appeals is to be Condemned in Charges of that ſecond inſtance: But the Party Appellate is firſt to be diſmiſſed with Charges: That is, he who was the Promoter of the Office of the Inferior Judge, muſt it ſeems be diſmiſſed with Charges, and the Judge muſt pay Charges. This Mr. *Clarke* ſaith, he hath known practiſed, ( *viz.* ) the aforeſaid Judge to be called, in a Contradictory Court. But here it is to be noted, that although at the ſecond number before going, it is ſaid that in the Proceedings tranſmitted, the Grievances do not appear to have been impoſed at the Petition of the Party Appellate, particularly named in the Appeal, and that the Party Appealing may deſire that it may be proceeded againſt the Judge, from whom he Appeals, and that the ſaid Judge may be called to anſwer in a Cauſe of Appeal; yet is it Lawful for the ſaid Party Appealing to prove by Witneſſes, ( that the Party Appellate did promote the Office of the ſaid Inferior Judge, from whom he Appeals, or that the ſaid Judge did inſtigate him to proceed in the ſaid buſineſs of correction ) notwithſtanding that nothing is tranſmitted of the proceedings had or made before the ſaid Judge, from whom it is Appealed: And this being proved, the Party Appealing ſhall obtain Sentence againſt them both; that is, both againſt the firſt Party Appellate, and alſo againſt the Judge.

* *Ubi fertur Sententia abſolutoria ab obſervatione judicii, debet actor in expenſis condemnari. Lanf. c. quoniam de expenſ. n.* 27.

5. If

5. If in a Matrimonial Cauſe, the Defendant (knowing that the Plaintiff can fully prove by Witneſſes, or by the confeſſion of the ſaid Defendant, the matrimonal contract alledged, out of an intention of protracting the Sute, and grieving the Plaintiff with infinite Charges, and alſo to prevent the pronouncing of a Definitive Sentence, for the Matrimony alledged) doth Appeal from certain pretended Grievances, whereas in very deed there were never any Grievances impoſed. Likewiſe if the Defendant in a Cauſe of Legacy, (at leaſt where the Legacy is conſiderable, that ſo he may by frivolous Appeals protract the Sute, and keep the Legacy in his cuſtody, whilſt the Sute depends, and alſo pay the Charges of Sute, with the uſe of the Legacy) doth Appeal from pretended Grievances, when in very deed, there was not any Cauſe of Grievance, offered at all. In theſe caſes the Party Appellate, (ſo ſoon as the Inhibition is returned back, and Certified to the Judge of the Appeal) he may conſent, that it may be proceeded (by the Judge of this Appeal) in the principal Cauſe, according to the form of the late Acts, which were had and done before the Judge from whom it is Appealed. And ſeeing the Party Appealing, by ſuch his Appeal, hath refuſed the Judge, (from whom he Appeals) as one whom he ſuſpects, and not a competent Judge on his behalf, and hath conſented to the Judge of the Appeal, as a fit Judge on his part; therefore he may be compelled (whether he will or not) to proceed in the principal Cauſe; and the Party Appellate is not obliged to pay the Charges of Grievance: Yet the Party Appealing, (if he thinks he hath Appealed juſtly) may alſo proceed in the Cauſe of Grievance; and if it doth appear by the proceedings, that the ſaid Appellant had a juſt Cauſe of an Appeal, he ſhall obtain Sentence with Charges: And if on the contrary, he make default in the proof thereof, then he is to be compeled to pay the Party Appellate his Charges.

6. If before the proceedings of the Judge (from whom it is Appealed) are tranſmitted, the Party Appellate doth confeſs the Grievances, and doth conſent that it ſhall be proceeded in the principal Cauſe, and doth pay the Charges of the Grievance; the Party Appealing (if he were

Plaintiff in the first instance, he ought to transmit the proceedings at his own costs; or otherways; the Judge to whom it is Appealed, cannot proceed in the principal Cause. Likewise if the Party Appellate were Plaintiff in the first instance, and desires that the Judge of the Appeal should proceed in the principal Cause, he must take care to get the Proceedings transmitted at his Charge. The Defendant may also in the first instance, whether he were the Party Appealing, or the Party Appellate, if he knew that the Plaintiff did Institute an injust Action in the first instance, and knowing that he hath been at a vast Charge in the Sute, already (that so he may recover the same again in the Appeal) he may cause the proceeding to be transmitted, but at his own costs. Yet admit that the Party Appellate will not confess the Grievances, but (having a mind to avoid Sute, and future Charges) doth consent to the Judge of the Appeal, and doth agree to proceed in the principal business; then if the Party Appealing doth believe that he can prove these Grievances, and if he will contest further about the same, he ought to transmit the proceedings at his own Charges; which thing if he refuseth, then he ought to be condemned in those Charges, which the Party Appellate hath been at, by reason of such a pretended Appeal from Grievances. And on the contrary, if the proceedings are transmitted, and it do appear by them, that such Grievances were imposed, the Party Appellate is to be Condemned in Charges. Therefore let the Party Appealing beware how he proceed any further in his Cause of Grievance, if he thinks he cannot justifie the same; and to avoid Charges, let him also consent with the Party Apellate, to proceed in the principal Cause, omitting his Cause of Grievance.

SECT.

## SECT. 2.

1. *The Judges of the Arch-biſhop deferring to pronounce Sentence, it is Lawful to Appeal from them.*
2. *When the Party Appealing from the rejection of a concluding matter, &c. ſhall obtain his Appeal, and when not. Alſo the manner of offering immediate proof.*
3. *The order and manner of Particularizing and Specifying this Appeal, from the rejection of this matter or Allegation.*
4. *The Party Appealing from Grievances which are impoſed at the very ſame time, in which the Definitive Sentence is Pronounced, ſhall have full Charges, and the Sentence (although juſtly Pronounced perhaps as to the Juſtice of the Cauſe) ſhall be retracted as unjuſt, though it were not Appealed from it.*
5. *It is Lawful to Appeal from an injuſt Excommunication, Pronounced upon a Falſe and undue Certificate of a Citation.*
6. *Of an Appeal from an Immoderate and Exceſſive Taxation of Charges.*
7. *The manner of juſtifying an Appeal from the Taxation of Charges, &c.*

IF it be concluded in the Cauſe, and the Advocates on both Parties have given the Judge informations, as well in matters of Fact, as in the points of Law, ſo as that they have nothing further to ſay in the Cauſe; and if there have been frequent aſſignations to hear Sentence, and the Judge hath refuſed, or at leaſt hath deferred unjuſtly to Pronounce Sentence, either for the Plaintiff or the Defendant, it is Lawful in theſe caſes, for the Party Grieved to Appeal (from theſe delays in not Adminiſtring Juſtice,) to the Kings Majeſty in his Court of Chancery; and the Appeal is valid; at leaſt ſaith Mr. *Clarke*, I have had it adjudged ſo in this caſe, twenty years ago. And although there are now certain and determinate Judges Delegates, yet they have not a Commiſſion to hear all Cauſes in general, but

only to hear and determine Causes of Appeal, which are interposed to the Kings Majesty, and to his Court of Chancery, by vertue of an Act of Parliament; and therefore non can have access to them by way of simple or double querele, *&c.*

2. If the Judge doth reject any conclusive matter which is pertinent to the Cause Instituted, ( *viz.* the payment of a Legacy and Tithes, or the exceptions against Witnesses † and such like things ) either expresly or tacitly, by proceeding to other things contrary to this Petition; the Party who desired the same to be admitted, may Appeal for the not admission of it; and if in his Appeal he doth not prove the Truth of the things propounded, and of the matters rejected, he ought to lose his Cause of Appeal; because it is to be presumed on behalf of the Judge; that is, that the Judge knew that the premisses alledged were not True, and that the same were propounded with an intention to protract the Sute; but if in the aforesaid cases, the Party propounding the premisses ( that is, the matter or Allegation, which is conclusive in Law ) doth aver before the Judge, that he doth not propound the same out of a malitious mind, nor with an intent injustly to delay the Sute, and that he believes he can prove the same; and thereupon doth offer himself ready and prepared to prove the same immediately and forthwith; and yet the Judge doth refuse to admit the same expresly, or tacitly by proceeding to other things, contrary or prejudicial to the admission thereof, or at least doth unjustly defer to admit the same; the Party Appealing in this case, shall prevail and obtain the Victory in his Cause of Appeal: Though in his Appeal, he doth not prove the Truth of the things contained in the matters or propositions, which were rejected. And this Mr. *Clarke* saith he hath had adjudged in a Court of Controversie six and twenty years ago; and it is daily practised thus before the Kings Delegates.

† *De Hisce gravaminibus plura & plenius reperias apud Lanfr. cap. quoniam, de Appel. a numb. 62. ad numerum 68. & præsertim in n. 66. ad rem loquitur.*

3. Mr. *Clarke* hath thought fit to add this, which follows, as an enlargement or confirmation, of what is said at the first number, and the first Sect. of this Chapter, ( *Scil.* ) that in Appeals, from the rejection of an Allegation, or other matters, ( although conclusive ) it is not sufficient,

ſufficient, ( if you intend to prevail in your Appeal ) that you inſert the things contained in the matter or Allegation which is rejected in your Appeal, but that you do alſo prove theſe contents ; for otherways, you ſhall loſe your Cauſe ; becauſe it is to be preſumed for the Judge, from whom it is Appealed, that either this rejected matter was propounded with an intention to protract the Sute, or that the Party could not prove the ſame : Add alſo that if in the matter rejected, there were contained any Articles or Poſitions, which by Law are not to be admitted, becauſe they are impertinent to the Cauſe, or were formerly propounded, or are contrary to thoſe which have been already propounded, ( upon which Witneſſes have been Produced, Sworn, Examined, and their Depoſitions publiſhed, and made known to the Parties : ) And admit, that in this Appeal you prove the Truth of all theſe Articles, yet the Judge of this Appeal ought not to admit theſe Articles, but only the reſt of the Articles which are pertinent, and ought to be admitted by Law ; and the Party Appealing in this caſe is to be condemned in Charges, at leaſt he ſhall not obtain Charges, and if he do obtain any, yet they ſhall be very mean and ſmall. The reaſon is becauſe that in ſo dubious a matter, it ſhall rather be preſumed for the Judge; and it may be urged on behalf of the ſaid Judge, from whom it is Appealed, that he hath rejected this Allegation or matter, in as much as it contains diverſe Cauſes, or diverſe Articles, which by Law ought not to be admitted ; or that the Judge, ( though he have rejected this matter, hath only rejected thoſe Articles, which are not to be admitted by Law : But *quære*, becauſe the Party Appellate, deſiring the whole matter to be rejected, and not conſenting ( either before the Judge from, or to whom it is Appealed ) that theſe poſitions ſhould be admitted, which by Law ought to be admitted ; he is therefore an occaſion of delay, and hath given occaſion for an Appeal, upon the rejection of the matters aforeſaid. Let the Proctors therefore take heed, that in theſe Appeals, from the rejection of any matter, ( if they are doubtful of any Article, whether it ought to be admitted or not ) they rather chuſe to admit, than inſert the ſame in the Appeal ;

and ſo by omitting thoſe Articles which are not to be admitted, they take away all controverſie, touching the Charges which are to be allowed, or are not to be allowed, or which are to be moderated.

4. If at the ſame time, in which the Sentence is pronounced, the Judge (before the pronouncing thereof) doth Grieve the Party againſt whom the Sentence is pronounced, by rejecting the Witneſſes, or any matter of defence which ought by Law to be admitted, the Party Appealing in this caſe, if he juſtifieth his Cauſe of Appeal from thoſe Grievances, ſhall obtain Sentence, with his whole Charges; and the Definitive Sentence, though otherways juſt, as to the merits of the Cauſe, yet (ſeeing it was pronounced within the time allowed for an Appeal from thoſe Grievances, impoſed at the ſame inſtant) it ſhall be revoked as an attempt, or a thing done by way of attempt, although it be not Appealed from the ſaid Sentence; yet the Party Appellate in this caſe may ask and procure Sentence to be pronounced (on a new ſcore, as to the principal Cauſe) before the Judge of the Appeal, and may obtain his Charges made in the firſt inſtance in all things, like as if it had been obtained in the firſt inſtance, before the Judge from whom it is Appealed, and as though it had not been Appealed at all. This Mr. *Clarke* ſaith he has known adjudged, but *quære quid ſit juris?*

5. Although every Excommunicate perſon, who is Excommunicate upon a fictitious, and falſe Certificate,* may and (by daily practice) is wont to object againſt this Certificate, and to deſire an Abſolution, from this injuſt Excommunication, yet may the Excommunicate perſon in this caſe Appeal from the ſaid Sentence of Excommunication, to the Superior Judge, and object before him, againſt the Certificate of the Citation, upon which he was Excommunicate; and if he proves theſe objections, he ſhall obtain his Appeal, and the Adverſe Party who obtained this Excommunication, is to be condemned in Charges of the whole Appeal, and of the injuſt Excommunication, and the principal Cauſe is to be tried before the Judge of the Appeal; if therefore this Cauſe of Appeal is given, and the Excommunicate perſon doth ſuſpect the Judge

* *Lanf. c. quoniam de Appel. n. 62.*

Judge, it is moſt ſafe for him to uſe this Appeal. And obſerve, that this Appeal ought to be interpoſed not only from the ſaid Sentence of Appeal only, but alſo if in caſe there were a Citation Decreed, *viis & modis*, by reaſon of a falſe Certificate, (*viz.* that the Party was ſought at his Houſe, *&c.*) the Appeal ought to be interpoſed as to the Decree of that Citation alſo. For to Decree a Party to be cited *viis & modis*, upon a Certificate that he was ſought in a place where he never inhabited, and to Decree a Citation, no primary or perſonal Citation preceeding, is all one and the ſame thing. And for certain to Decree any one (unleſs he be a fugitive, and ſuch as hath no habitation,) to be cited by publick edict, *viis & modis*, no primary Citation preceeding, it is a very juſt Grievance. Of this ſee more, where it is ſpoke of the manner of objecting againſt an injuſt Excommunication, in the ſecond part of this Book.

6. If exceſſive Charges are taxed, * that is, if the Judge doth exceed in the Taxation, it is convenient for the Party Appealing to declare particularly in his Appeal, to deduct theſe exceſſes, and to diſtinguiſh firſt thoſe Charges, which are to be allowed by Law, and by the Stile of the Court, and alſo thoſe which are expended by the Party: And then becauſe in the Schedule of Charges, which is offered by the Party, and is Taxed by the Judge, there are contained both the juſt and alſo the extraordinary Charges; in this Appeal therefore mention is to be made of the whole Schedule of Charges; and ſeeing that if both theſe Schedules, (*viz.* the ſaid firſt Schedule, which contains only the juſt and due Charges, and alſo that whole Schedule given by the Party, and Taxed by the Judge, which contains as well thoſe which are due, as thoſe which are extraordinary) were inſerted in the Appeal, and the Inhibition, (for the Inhibition ought to contain the tenor of the whole Appeal) the ſame would be too long and tedious: And therefore theſe Schedules are to be annexed to the Appeal, and theſe words are to be inſerted, (*Scil.*) 'As is contained in the Schedules annexed to theſe preſents, which 'I the Proctor aforeſaid will, and do deſire may be accounted as read, and inſerted in this Appeal, *&c.* In which

* *Lanfr. c. quoniam de Appel. n.* 66.

ſecond Schedule thus annexed, the extraordinary Charges are to be deſcribed, and ſet down. And the ſaid extraordinary Charges ſo contained in that Schedule, ought to be particularly inſerted, either in the Appeal, or elſe by referring to a third Schedule, annexed thereto alſo. It is likewiſe neceſſary, to conclude in that Appeal, that if theſe extraordinary Charges, (which is to be underſtood of thoſe Charges, mentioned in the third Schedule) which are not allowable, or if many or ſome of them had not been allowed and Taxed by the Judge, in his general Taxation, the ſum ſo Taxed could not have extended to above ſuch a ſum: And in this the Party Appealing is wont to refer himſelf to theſe reſpective Schedules or Charges, and to the Taxation made by the Judge; for at the bottom of the Schedule which is offered, the Judge is wont to Tax the Charges to ſuch a certain ſum.

7. Now Mr. *Clarke* ſays, he cannot remember, that the Parties Appealing in theſe caſes, ever got their Appeal; the reaſon whereof, he ſuppoſeth was partly becauſe the Appeals were not concluding, nor particularly deſcribing the extraordinary Charges; and partly (though the Judge might exceed a due meaſure in the Taxation) yet becauſe the Party Appealing made default in the proof of this exceſs. That therefore the Parties Appealing (from ſuch immoderate Taxation,) may obtain their Appeal, they muſt prove the exceſs or immoderate Taxation, on this manner. If in the Schedule of Charges, there are extraordinary Charges asked for the diſpatch of a Commiſſion, in remote parts, (as is very uſual) the Notary who was taken and made choice of, for the diſpatch of this Commiſſion, is to be produced as a Witneſs; if any extraordinary ſum is pretended to be given to the Commiſſioners, for their pains about the diſpatch of this Commiſſion: If an extraordinary ſum is deſired to be allowed, under colour of journey Charges for the Witneſſes; or any other Charges about the Witneſſes or Commiſſioners, to wit for their meat, *&c.* the ſaid Commiſſioners and Witneſſes are to be produced, as alſo thoſe perſons, in whoſe Houſes the Commiſſioners ſate, and where the Witneſſes were produced and had their meat: Which perſons without doubt,

can

can depoſe the reſpective ſums they received, and which were duly diſburſed in and about the ſame. If alſo in the ſaid Schedule of Charges, a greater ſum is asked for the Examination of the Witneſſes, for the Copies of their Depoſitions, and for the Proctors Fees, than is due by the Stile of that Court, (in which the Cauſe is tried,) this Cuſtom of the Court, and the real ſum, which is due by that Stile or Cuſtom, ought to be alledged and proved by the Party Appealing; becauſe theſe Charges cannot be proved, but by inſpection of the proceedings of the Judge, from whom it is Appealed. But if in the aforeſaid Bill of Charges, the Party who obtains this Taxation, doth deſire any Fees, for the Examination and Copies of more Witneſſes than were examined, or doth deſire Fees for Proctors, Advocates, or Sollicitors for any Term, before the Sute was begun, or for thoſe Terms in which nothing at all was done in the Cauſe, (it being perhaps put to Arbitration, for two or three Terms together) theſe exceſſes may be juſtified by the Acts themſelves: And if (when theſe extraordinary and inallowable Charges are deducted) it doth appear, that (if theſe extraordinary Charges, or ſome of them, had not been allowed by the Judge, from whom it is Appealed in his ſaid general Taxation,) the remaining ſum or Charges, ſpecified in the ſaid Schedule, could not have extended to the ſum Taxed, the Party Appealing in this caſe, ſhall obtain his Appeal. But it is to be noted, that although the Judge of the Appeal do reform the Decree (as to the Taxation of Charges) interpoſed by the Inferior Judge, and do condemn the Party Appellate, in the Charges of the whole Appeal; yet if it be required of him, the ſaid Judge to whom it is Appealed, ſhall Tax and allow the Party Appellate his Lawful and Juſt Charges, and ſhall compel the Party Appealing to pay the ſame, if it be Appealed only from the extraordinary Taxation. For if it were Appealed, as well from the Definitive Sentence, as alſo from the Taxation of Charges and the Judge of the Appeal, proceeding in both the Cauſes, doth pronounce his Sentence againſt the Party Appellate, whereby he retracts the Sentence of the Inferior Judge, as to the principal Cauſe; the Appellate in this caſe,

case, in the said Cause of Appeal, from a Taxation of Charges, shall not obtain a new Taxation of Charges, for the Party Appealing is to be freed from all Charges, and shall obtain his Charges of the first instance. See further what is said of compounding the Charges, at the first Chapter and the second number of this part.

THE

# THE PRACTICE OF THE Eccleſiaſtical Courts.

## *THE SIXTH PART.*

## CHAP. I.

### SECT. 1.

### Of Matrimonial Contracts.

1. *Cauſes touching Matrimony are wont to be tried in theſe Courts. Alſo in what form inſtituted, and how manyfold theſe Cauſes are.*
2. *The manner of getting a Citation with an Inhibition in Cauſes of Contract.*
3. *The manner of proceeding in a Cauſe of Jactitation or Boaſting of Matrimony, and the tenor of the Sentence to be pronounced in the Cauſe.*
4. *The form of alledging and juſtifying this Jactitation of Marriage, before the Sute is conteſted. And of the tenor of the Sentence, if the Defendant doth juſtifie this Jactitation or Boaſting.*

5. *The*

5. *The Defendant may give and propound, a justifiable matter ( in this Cause of Factitation of Marriage, in order to justifie what he hath so boasted of ) after Sute is contested. Also the tenor of the Sentence in this case.*
6. *The Defendant being cited in a Cause of Factitation or Boasting of Marriage, may Institute an Action against the Plaintiff, ( in a Matrimonial Cause about a Contract ) either in the same Court, where himself is so cited, or before any other competent Judge.*
7. *The manner of Beginning, Prosecuting, and Ending a Cause of Contract, if the Defendant either cannot be cited, or if being cited by publick Edict, he do not appear either by himself, or his Proctor.*
8. *The manner of producing Witnesses in a Cause of Contract, after the Attests are published; and the especial priviledge of this Cause.*
9. *The manner of Sequestring or Separating the Woman ( who is Sued in this Cause ) from the custody of her parents, whilst the Sute depends.*
10. *Of a general intimation and Inhibition in a Cause of contract.*
11. *The manner of punishing those persons, who contract or solemnize a clandestine Marrage, whilst the Sute depends, or against the Inhibition of the Judge.*
12. *The Matrimony which is contracted, or solemnized whilst a Sute depends, enjoys not the like priviledges, as a Marriage which is really, and Lawfully solemnized.*
13. *The manner of proceeding, if the Party who is Sued ( being Excommunicate and Imprisoned ) doth agree to solemnize the Marriage.*
14. *In what cases the Judge may condemn the Party obtaining the Sentence in Charges, or absolve the Party ( against whom the Sentence is pronounced ) from Charges.*
15. *The manner of putting Sentence in Execution in these Causes of Contracts.*
16. *The manner of proceeding against the Defendant refusing to solemnize the Marriage, according to the tenor of the Sentence.*

17. *Another*

17. *Another manner of proceeding if the Defendant doth yet refuſe to ſolemnize the Marriage, notwithſtanding.*
18. *A third perſon may come in for his intereſt in this Cauſe of Contract, and certain other Cauſes.*

IF any doth contract Marriage, but doth not ſolemnize it in the Face of the Church; and if the Woman doth deny this contract; the Man may Inſtitute an Action in a Cauſe of contract; and if the Plaintiff fear that the Woman (whilſt the Sute depends) doth intend to contract another Marriage, he may take care to inſert in the ſaid Citation, an Inhibition againſt the Party to be cited, to forbid her to contract Marriage with any other, whilſt the Sute depends or that ſhe procure any former contract to be ſolemnized. 2. If a Marriage is ſolemnized in the Church, and the Woman doth go from her Husband, * or if on the contrary a Husband hath caſt off his Wife, then an Action is to be Inſtituted in a Cauſe of Reſtitution of the conjugal Yoak. If any doth ſolemnize Matrimony with one Woman, and doth afterwards procure a ſecond Marriage to be ſolemnized: If ſhe who is the Lawful Wife doth deſire to be reſtored to her Husband, an Action is to be Inſtituted in a Cauſe of Divorce, from the Bond of Matrimony, and of Reſtitution of the conjugal Yoak. But the Action is to be commenced, as well againſt the Party taking the ſecond Wife, as alſo againſt the ſaid ſecond Wife ſo taken: Or otherways, a Sentence of Divorce being pronounced againſt the Man, (the ſaid Woman taken in the ſecond Marriage, not being alſo called) the Sentence avails not as to her, nor ſhall this Sute prejudice her, which otherways it might do if ſhe were called, and the aforeſaid Sute were Inſtituted againſt them both. And this which is ſaid as to the Woman, has the like effect, as to the Man. 3. Likewiſe if a Woman who is Married to a Man, who hath a former Wife in being, doth deſire to be releaſed from that Man (ſhe having alſo a former Husband in being.) And deſiring that the performance of the ſaid Matrimonial contract, betwixt her and the ſaid Man, may be pronounced as null and invalid; in this caſe, ſhe

* *Maritus tanquam Excommunicatus poteſt agere in hac Cauſa. cap. Thoſs. queſt. 172.*

she must Institute her Action, as is usual in a Cause of Divorce, from the Bond of Matrimony; and for those reasons even now mentioned, it is expedient that that Action be Instituted against the Lawful Wife of the said Man. The like also must be observed against the Woman. 4. If a Virgin who is within twelve years of age, † but above seven doth actually solemnize a Marriage with a Minor, who is under fourteen years of age; so soon as she comes to a Lawful age, that is, to twelve years of age, she may come before a Notary publick (if a Notary can be had) and before Witnesses, and may dissent from this Marriage, and protest that she doth not in the least intend to ratifie the said Marriage in any respect, or consent to it; but on the contrary, to recede from it, and forsake it: In this case she may Lawfully solemnize a second Mariage, with any other; for by this dissenting the first Marriage is rendred null: What is here said of a Girl under twelve years of age may also be understood to take place in a Man who is Married under fourteen years of age. Yet in these cases before persons contract and solemnize a second Marriage, they are wont to commence an Action against the person, (with whom they did actually Marry in their Minority) when they come to Lawful age, in a Cause of Nullity of Matrimony, and they may obtain the Sentence of the Judge for the Nullity thereof. Yet although the persons in this case are wont (before their second Marriage,) to Institute an Action, for the Nullity of the first Marriage, and to obtain Sentence accordingly, yet if before the Institution of this Cause, the said Woman doth solemnize another Marriage (no Sentence preceding) this second Marriage is valid, and is accounted Lawful, so as (after the said Party hath attained the Lawful age) no manner of consent went before, either in Words or Acts, which might tend to a confirmation of the first Marriage. But admit that the Woman doth come to full age, whilst the Man is yet in his minority, that is, under fourteen years of age, (for in this case, there is required an express dissent as above, or an Institution of the Action for the Nullity of the Marriage, seeing there is required the * mutual consent of both the Parties, ere the aforesaid Marriage be perfect; which

† *Wesemb. parat. ff. de ritu nupt. n. 4. 8. Litt. C. col. 951. Mynſ. Inſt. de nuptiis in text. juſtas autem. n. 4. Contraria. Matrimonio ſunt quam plurima, quæ vel impediunt illud contrahi vel contractum diſſolvunt hæ plenius traduntur à Weſemb. ubi ſupra per tot. num. 8.*

* *Schurffius conſil. 83. n. 11. cent. 3. Baldus, in rept. l. 1. n. 4. C. de eman. lib. Socinus conſil. 39. n. 3. & 5. vol. 1. Mynſ. Inſt. de nup. in text. Juſtas autem. n. 7.*

which cannot be had, if either of the Parties be a Minor;) therefore the Woman (as was ſaid above) may very Lawfully contract, and ſolemnize a ſecond Marriage: Yet the premiſſes are to be underſtood of a young Man, who ſolemnizeth a Marriage, within fourteen years of age, and doth not diſſent from this Marriage ſo ſoon as he comes to a Lawful age; the young Woman being then alſo younger. If in this caſe even now ſpecified, the aforeſaid Parties, who do actually ſolemnize this Marriage in their Minority, ſo ſoon as they come to their full age, (that is, the Woman to twelve, and the Man to fourteen) do ratifie the ſaid firſt Marriage, by words, calling each other Husband and Wife, or by Deeds or Letters, Meſſages, Gifts, or other ſigns of familiarity, hereby approving the ſaid Marriage, (though ſo ſolemnized within the aforeſaid years) but more particularly ratifying it by carnal knowledge of each other, lying together in one and the ſame Bed; and yet notwithſtanding all this, they endeavour to ſolemnize a ſecond Marriage, with ſome elſe; either of the Parties in this caſe, may Sue the other, (who endeavours a ſecond Marriage) in a Matrimonal Cauſe, and in a Cauſe of Divorce; and if the Plaintiff in this Cauſe do prove the firſt Marriage ratified, by a conſent (as aforeſaid) either by Words or Letters, *&c.* before the ſecond Marriage, and after the Lawful age; he or ſhe thus Suing ſhall obtain a Sentence of Divorce, revoking the ſecond Marriage, and confirming the firſt Marriage. 5. If any do contract, and ſolemnize a Marriage within the degrees of conſanguinity * or affinity being prohibited by the Divine Law, or not permitted by the Laws of the Realm; this Copulation is not Matrimony, but Adultery, or rather inceſt: And an Action of Divorce, from the Bond of Matrimony, may be commenced by both Parties; or rather (ſeeing the Marriage was void in the beginning) an Action may be commenced in a Cauſe of nullity of the Marriage. 6. If a young Man doth treat with a Woman, in order to contract a Marriage with her, or perhaps hath contracted a future Marriage, but not a Marriage to be celebrated immediately, but only after ſome time, or under ſome conditions, whoſe event muſt firſt be expected:

* *Weſemb. ubi ſupra. col.* 963. *Litt. B. Inſt. de nuptiis Sect. ergo.*

If

If the ſaid Woman doth boaſt and affirm, that the ſaid young Man hath contracted a Marriage with her, which is to take place immediately, and ſo conſequently doth call him her Husband, and her ſelf his Wife, (which often falls out to the great prejudice of the young Man, who purpoſeth to contract another Marriage) this young Man may have an Action againſt this Woman, in a Cauſe of Jactitation of Marriage. 7. The like Cauſe alſo, the Woman may Inſtitute againſt the Man, in the like caſe: And becauſe Marriage is not only ordained to avoid Fornication, but alſo for Procreation; if therefore a Marriage is actually ſolemnized betwixt a Man and a Woman, who are altogether uncapable (not by reaſon of age, but by reaſon of ſome natural Impediment) to Procreate Children to wit, by reaſon of Impotency, coldneſs and the like, theſe render the Marriage null. Thoſe natural impediments ſometimes happen, both to the Woman and the Man. 8. If a Husband is Cruel and Brutiſh to his Wife, threatning her Death, or uſing her Barbarouſly in Words or Actions, giving her Poiſon to Drink, or committing ſome ſuch like act ſo as the Woman is in danger of her Life, by living with her Husband, or at leaſt is not able to undergo the conjugal Yoak; the Woman in this caſe may commence Sute againſt her Husband in a Cauſe of Divorce, or rather in a Cauſe of ſeparation from Bed and Board by reaſon of cruelty. The like Cauſe alſo may be Inſtituted by the Man againſt his Wife. 9. If a Woman deſires to be Separated or Divorced from her Husband, (or on the contrary a Man from his Wife) by reaſon of Adultery, they muſt alſo commence the like action, in a Cauſe of Divorce or Separation from Bed and Board. 10. If the Parents, or Friends of a Man or a Woman, who were preſent at the time of ſolemnizing, or contracting a Marriage betwixt their Children or Kindred, *&c.* or any other Perſons; or if a Definitive Sentence is Pronounced for a Marriage (the Parents or Friends knowing of and being preſent to ſuch a Sentence) from which Sentence, no Appeal is interpoſed, or if an Appeal be interpoſed, yet the ſame is not proſecuted, but deſerted: Notwithſtanding which, the ſaid Parents or Friends, of the ſaid Woman, do ſo keep

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and detain her, againſt her Will, that ſhe cannot be cited to anſwer in a Matrimonial Cauſe, or ſhe cannot be had or come to, ſo as the Marriage may be ſolemnized, according to the Sentence; or if they do by words or threatnings endeavour to perſwade the Girl to deny the Marriage, although contracted in their preſence, or adjudged by Sentence as above, and do endeavour to Alienate her Love and Affection, from this Man, and ſometimes do Sollicit her to Marry ſome elſe: In this caſe, he who contracted this Marriage with the ſaid Girl, may Sue the ſaid Parents, or Friends in a Cauſe of hindrance of Marriage; and the premiſſes being proved, they are to be Corrected and Puniſhed, according to Law, and at the Judge his pleaſure, and are to be condemned in Charges. The like may be underſtood of a young Man, if the Woman is Plaintiff.

2. If a Plaintiff in a Matrimonial * Cauſe, doth believe or doubt, that the Defendant who is to be cited, will (whilſt the Sute doth depend,) contract or ſolemnize Marriage with ſome other: Let them take care to inſert an Inhibition in the Citation, againſt the Party to be cited to inhibit or forbid them to contract any other Marriage, with any other perſon, whilſt the Sute doth depend; and that (if they have actually contracted any ſuch Marriage, before the ſaid citation is Executed,) they proceed not to ſolemnize the ſame, in the Face of the Church, under penalty of contempt of the Law. And if the Plaintiff doth know or ſuſpect any perſon who is likely to ſolemnize Marriage with the Defendant, they obtain a general Inhibition in the ſaid citation, (*viz.*) againſt the Defendant and the ſaid Perſon whom they ſuſpect in ſpecial, and all others in general, forbidding them to do, or attempt to do any thing in prejudice of the Sute, (whilſt it depends) under Penalty, *&c.*

3. A Cauſe of jactitation of Marriage, is a Plenary Cauſe, and requires the like proceeding, as a Cauſe of defamation; this only excepted, that in a Cauſe of jactitation of Marriage, the defendant is to be compelled to anſwer to the poſitions of the Libel, though no Witneſſes are produced upon the ſame, which cannot be done in a Cauſe

* *Hic intenditur de ſponſalibus. Sponſalia quæ ſunt, unde dicta & quoritu olim & nunc facta. Mynſ. Inſt. de nup. Sect. ſi uxor. n. 3, 4. Gail. 2. obſ. 80. n. 5 Weſemb. ff. de ritu nup. n. 2. Alciat. ff. de verb. ſig. l. pronuntiat. 46. Sect. mater fam. n. 8. Angelus & Fat. in Sect. alien. in princip. Inſt. de donation. in l. tale. 40. Actio ex ſponſa vel ex ſponſo, item Matrimonialis, eſt nihil aliud quam jus perſequendi quod ſponſo, ſponſæ vel parentibus eorum contra ſponſum ſponſamve matrimonii conſummationem recuſantem, &c. ut reus condemnetur ad Matrimonii conſummationem, &c. Dn. Habn. ad Weſemb. parat. de ſponſal. n. 6.*

of defamation. If therefore the Plaintiff do prove, either by the Defendants Confeſſion, or by Witneſſes, that the Defendant ſaid or boaſted, that he had contracted Marriage with the Defendant, or that the Plaintiff was his Wife, and if the Defendant doth not alledge and prove that he ſaid, and boaſted this upon ſome juſt grounds, ( *Scil.* if he cannot prove that an immediate Marriage * was contracted betwixt them, as he hath given out ) in this caſe, Sentence is to be pronounced for the Plaintiff to this purpoſe, ( *viz.* ) that the Defendant hath raſhly and injuſtly boaſted ſuch a contract, and perpetual ſilence is to be impoſed to the ſaid Defendant, in that behalf, and he is alſo to be condemned in Charges.

* *Sponſalia porrò alia dicuntur de futuro alia de præſenti quæ ſunt vide Wemb. parat. ff. de ſponſal. n.* 3. *Carozovii prax. crim.* 2. 9. 56. *n.* 22. *& in Jurisprud. Eccl. l.* 2. *t.* 2. *d.* 18. *Thomas Sanchez de Matrimon. l.* 7. *d.* 82.

4. But if the Defendant being called, doth intend to juſtifie the jactitation of Marriage mentioned in the Libel, ( that is, that he hath juſtly and truly ſaid and boaſted ſuch a contract ) he may propound a juſtificatory, or a defenſive matter or Allegation, ( on the day aſſigned him or his Proctor to anſwer to the Libel of the Plaintiff ) before Sute is conteſted, or inſtead of the form of conteſting Sute: And that may be done thus. 'I *N.* ( that is the Defendant 'or his Proctor ) in anſwer to the Libel, already given in, 'in this Cauſe, do here give in a matter or Allegation, in 'ſtead of an anſwer; and I do Anſwer, Alledge, Proteſt, 'and do all other things, as is contained in this Allegation: 'And under Proteſtation of the Nullity, the Ineptitude, 'Generality, *&c.* of the ſaid Libel of my Adverſary, I do 'conteſt Sute negatively to the ſame. Seeing the juſtification of this boaſting of Marriage is propounded and alledged at the time of conteſting Sute, if the Defendant prove, that his boaſting was upon juſt grounds, ( that is, that he did really contract an abſolute Marriage with the Plaintiff ) the Judge may pronounce in one and the ſame Sentence, not only that the Plaintiff hath made default in the proof of his Libel, ( at leaſt in as much as he deſires, that the Defendant may be pronounced to have defamed, and unjuſtly boaſted ſuch a contract with the Plaintiff, and alſo that ſilence may be impoſed to the Defendant ) but alſo Sentence may be pronounced at the ſame time, for the Marriage alledged like as if a Matrimonial Cauſe had been

been originally Inſtituted: But if the Defendant doth make default, in the proof of what he undertakes to juſtifie; then on the contrary, Sentence is to be Pronounced that the Plaintiff hath proved his Libel, and that the Defendant hath failed to juſtifie and prove the contract by him alledged and pretended, and that therefore perpetual ſilence is to be impoſed upon the Defendant, as to the matters by him deſired and alledged, and that the Plaintiff ſhall be diſmiſſed from the Inſtance and Petition of the Defendant, and the ſaid Defendant to be condemned in Charges, of the whole Sute.

5. And although (as is now ſaid) this matter in order to juſtifie the contract ſo Boaſted of, may be propounded upon the day aſſigned to anſwer the Libel, and inſtead of conteſtation of Sute, yet the Defendant may alſo propound this matter after the Sute is conteſted, in order to fruſtrate the intention of the Plaintiff; yet ſo as the ſame be propounded before the depoſitions of the Plaintiffs Witneſſes, (produced upon a Libel) be publiſhed. For after the atteſts are publiſhed, and that the Defendant is informed of the contents of them, it is forbid to give in any matter which is directly contrary. But *quære*, whether or no (notwithſtanding ſuch publication, and information of the depoſitions,) any matter, though contrary, may not be propounded in a Matrimonial Cauſe; if the Defendant in this caſe doth juſtifie what he Boaſted, (that is, if he doth fully prove a Matrimonial contract betwixt him and the Plaintiff) he ſhall only obtain an abſolutory Sentence, (*viz.*) that the Plaintiff hath made default in the proof of his Libel, and that the Defendant is to be diſmiſſed, and abſolved from the inſtance of the Plaintiff. Yet formerly the Advocates were of opinion (and ſo it hath uſually been practiſed) that in this caſe now mentioned, (*viz.*) that if the Defendant do prove the Matrimonial contract, although alledged by him after Sute was conteſted, yet he ſhould obtain Sentence as above. And (though we ſaid before, that the ſaid matter ought to be propounded before the Publication of the Witneſſes, leſt it ſhould be denied admittance after) yet if in the Libel no certain day or place (in which the Words of Boaſting are pretended to

be ſpoke ) are inſerted but only in general, upon or about ſuch Months, ( naming ſeveral Months ) and in ſuch or ſuch a place, as is uſual in theſe caſes; here though the Defendants matter be directly contrary to the Plaintiffs Libel, yet it may be propounded: Becauſe the Defendant by reaſon of that general Allegation cannot defend himſelf, which otherways he might eaſily do, after the Atteſts are publiſhed. For then if the Witneſſes do depoſe, as to the time and place, in which the Defendant uttered the words mentioned in the Libel, he may prove a negative, ( *viz.* ) that he was abſent at that time, and from that place they Swear to; and that he was at that inſtant ( they ſpeak of ) preſent in another place: As alſo he may prove by other Witneſſes ( who gave diligent attention ) which and what words, were ſpoke by the Defendant: He may alſo produce a greater number of Witneſſes ( who were preſent at the time and place depoſed by the Plaintiffs Witneſſes ) who may perhaps Swear that the Defendant never ſpoke ſuch words. The Defendant may alſo prove, that he contracted Marriage with the Plaintiff, before the time of ſpeaking the words mentioned in the Libel, and therefore that he hath juſtly Boaſted, *&c.*

6. Some of our late Advocates are of opinion ( and ſo Mr. *Clarke* ſays he has known it adjudged ) that the Party who is cited to anſwer in a Cauſe of Jactitation of Marriage, may either in the ſame Court, or before any other competent Judge ( notwithſtanding a citation is firſt Executed upon him in a Cauſe of Jactitation of Marriage) inſtitute a Matrimonial Cauſe againſt the ſaid Plaintiff: Though in former times the Advocates were of a contrary opinion, ( *viz.* ) that the Defendant could not Inſtitute a Matrimonial Cauſe either before the ſame Judge, or any other competent Judge whatever; but that he is bound to alledge the Marriage ( if he hath contracted any with the Plaintiff ) before the ſame Judge, and in the ſame Cauſe which is ſo Inſtituted againſt him for Boaſting the Marriage, *&c.* and not in any other new Cauſe. The reaſons they give for this opinion, are, that if two ſeveral Cauſes are Inſtituted, the one for Boaſting a Marriage, and the other for a Matrimonial contract; it might eaſily fall out, that

two

two contrary Sentences might happen to be pronounced by the ſame Judge. ( *Viz.* ) If the Defendant hath not alledged and proved the Matrimonial contract in the ſaid Cauſe of Jactitation of Marriage, that then Sentence is to be pronounced ( as above ) that the Plaintiff hath proved, that the Defendant hath injuſtly Boaſted himſelf to have contracted Marriage with the Plaintiff, and that therefore perpetual ſilence is to be impoſed upon the Defendant in that behalf. And on the contrary if in another Cauſe, ( *viz.* ) which Inſtituted for a Matrimonial contract, the Plaintiff doth prove the contract alledged, then Sentence is to be given for the Matrimony alledged, determining that the ſame ought to be ſolemnized betwixt the Plaintiff and the Defendant. The Advocates who are of a contrary opinion to this practiſe, ſay that this ſecond Cauſe doth divide the continency of the Cauſe: Therefore in this queſtion, conſult the Learned Advocates. But admit this ſecond Cauſe, ( *viz.* the Matrimonial Cauſe ) may be Inſtituted in another, or in the ſame Court, the Cauſe of Jactitation being then alſo Inſtituted; yet it may be preſumed, that this ſecond Plaintiff hath Inſtituted the ſame out of a malicious mind, intending to oppreſs the Adverſary with many Sutes, and much Charge. Therefore it ſeems moſt practicable for the Cauſe about the Matrimonial contract, to be Inſtituted at the ſame time, in which the Cauſe about this Jactitation or Boaſting of Marriage is Inſtituted, ſeeing they may both be tryed with one and the ſame Charges.

7. If a Man hath contracted Marriage * with a Woman, or on the contrary a Woman with a Man, and do deſire to Sue in a Matrimonial Cauſe, yet cannot cite the Adverſary, becauſe he either abſconds in the Kingdom, or is gone out of the Kingdom: And leſt the Witneſſes of the Plaintiff, who ſhould prove this contract ſhould die ere they are examined: Therefore they muſt proceed on this manner. Firſt the Plaintiff muſt deſire a citation againſt the abſent Party to anſwer in a Matrimonial Cauſe, and muſt take care that the Mandatory do ſeek the Party to be cited in thoſe places where he laſt reſiſted, or abode: And that he make diligent enquiry amongſt the Neighbours,

* *Vide quæ notavi ad n. 2. hujus Sect.*

Parents, and Kindred of the Party ſo to be cited: And if the ſaid Party doth ſo abſcond, as that he cannot be cited, the Mandatory muſt make a Certificate upon this Mandate according to the uſual form: And thereupon a citation *viis & modis*, is to be asked and decreed, which muſt alſo be Executed and Certified, after the uſual manner. But if the Party ſo cited do not appear, he is to be decreed, and publickly denounced Excommunicate in that Pariſh Church, where he laſt reſided, and alſo in the Pariſh Church where his Parents reſide. Which being thus done; about a Week or more after ſuch Denunciation the Plaintiff or his Proctor may appear and alledge that he hath uſed all poſſible diligence in order to cite the Adverſe Party, to anſwer him in a Matrimonial Cauſe, and that the ſaid Party doth ſo abſcond, as that he cannot be perſonally cited, and that therefore he hath taken care to get him cited by publick Edict, which publick Edict is alſo Executed, Certified, and the ſaid Party Pronounced, Decreed, and Denounced Excommunicate upon the ſame, publickly in the Pariſh Church, where his laſt abode was, as may appear by the ſaid Letters of Excommunication, ſo denounced, (which Letters the Plaintiff muſt then exhibit) and that notwithſtanding the premiſſes, the ſaid Defendant doth fly from Judgment, and doth contumaciouſly abſent himſelf from the ſame, and that the Parents, Kindred and Neighbours of the ſaid Party do commonly report, that he hath tranſported himſelf beyond Seas, ſo as this your Mandate may not be Executed upon him, or any Sute be proſecuted againſt him; and further the ſaid Plaintiff muſt alſo alledge, that the Witneſſes which he hath to prove this contract, are old and infirm (if it be ſo) or that it is very doubtful as to their lives, or however, leſt in proceſs of time, they ſhould forget the formal words of the contract, or other circumſtances touching the ſame, as alſo the giving and receiving of Gold, and of the Ring as ſigns of this contract, and likewiſe the Confeſſion and acknowledgment made (of this contract) by the Party himſelf, (which things are apt to ſlide out of the memory) and ſo their Teſtimony may be in danger of periſhing, to the great dammage of the ſaid Plaintiff; wherefore he muſt deſire that the ſaid Defendant may

be

be called to appear within Threeſcore, Fifty, Forty, or Thirty Days at leaſt, after Execution of this Citation, ( if the Party to be cited, be without the Kingdom ) if it be a Court day, *&c.* ( as in other ordinary Citations ) by publick Edict, affixed as well upon the doors of the Pariſh Church, where the Defendant laſt reſided, as alſo upon the Royal Exchange, at the time of the Merchants meeting together. By which publick Edict the ſaid Party muſt be cited to theſe following effects, *Scil.*

To anſwer *M.* in a Matrimonial Cauſe.
To ſee a Libel given.
To ſee a Term aſſigned to prove the ſaid Libel.
To ſee Witneſſes, Produced, Admitted, Swore and Examined upon the ſame.
To ſee the Sayings and Depoſitions of the ſaid Witneſſes publiſhed.
To propound any matters, Defenſive Allegations, or exceptions againſt the Witneſſes to be produced in the ſaid Cauſe, if he have any to propound.
To ſee and hear a Term, and Terms aſſigned to hear Sentence in the Cauſe.
To ſee and hear the Definitive Sentence pronounced in the Cauſe.

And Laſtly, to be preſent at all the general Seſſions to be held in the aforeſaid Courts, ( whilſt the ſaid Cauſe doth depend, ) until the Definitive Sentence be pronounced in the ſame incluſively ; and alſo an intimation muſt be made in the ſaid publick Edict, to the ſaid Party, that whether he do or do not appear, on the ſaid day and place, the Judge doth intend to proceed, to receive and admit the Libel, *&c.* ( here all the aforeſaid effects of the preceding Citation muſt be again reiterated ) his abſence or contumacy in any reſpect notwithſtanding this Mandate, or citatory decree with an authentical Certificate, of the Execution thereof being brought into Court, and the Party cited, being called publickly three times and not appearing, it ought to be proceeded ( in penalty of the contempt of the ſaid Party, ) to all and ſingular the effects aforeſaid re-

ſpectively, and alſo to the pronouncing the Definitive Sentence incluſively, notwithſtanding the contempt of the ſaid Party. Yet the Proctor of the Plaintiff ought to take heed that he deſire nothing to be done or decreed, but in penalty of the contempt of the ſaid Defendant, Firſt Accuſed, Called, and Pronounced as Contumacious: And that this may be Lawfully done, the Certificate of the ſaid Mandate, or original citatory decree, ought to be continued from one Court day to another Court day. For that Certificate being at a period, or (as they ſay) being diſcontinued, the ſaid citatory decree is at a period alſo, and nothing can be decreed, at leaſt, ſo as that the Act may avail in contempt of the Defendant. Yet although it is aboveſaid, that the Defendant ought to be cited by a publick Edict, to all the aforeſaid effects, reſpectively, Mr. *Clarke* thinks it moſt ſafe (and ſo he is wont to practice) after the Witneſſes are produced and examined, to cite the Defendant again, in manner and form as above, to ſome of the aforeſaid effects, (*Scil.*) to ſee the Depoſitions of the Witneſſes publiſhed, to propound exceptions againſt theſe Witneſſes, (naming thoſe Witneſſes in the decree) or any other matter whatſoever, if he thinks fit to uſe or propound any: And alſo to hear and ſee a Term, or Terms aſſigned for Sentence, and to be preſent at the pronouncing of the ſame incluſively, with an intimation as above. Alſo the like ſecond Proceſs may be made, if any (after Matrimony is ſolemnized or contracted) hath knowledge that the Party (with whom this Marriage or contract is made) did firſt contract or ſolemnize a Marriage with another, left (as is ſaid above) the teſtimony of the neceſſary Witneſſes in that behalf ſhould periſh. But in theſe and all other the like caſes, it is to be noted, that if Witneſſes neceſſary to prove the Libel, were not produced, or by reaſon of the diſtance of the place, or the age of the Witneſſes could not be judicially produced in that place, which the Defendant was cited to appear at, but that they are to be produced in remote parts, upon a Commiſſion, (becauſe the Defendant was not cited by the publick Edict aforeſaid to appear in any other place, but in the judicial place, and therefore he is not contumacious to any other effect out

of

of the place he was firſt cited to) the Plaintiff ought therefore to cite the Defendant a new, in manner and form aforeſaid, to appear in the place, and on days to be aſſigned by Commiſſioners, for the diſpatch of the ſaid Commiſſion, to ſee Witneſſes Produced, Received and Sworn upon the Libel aforeſaid, and to ſee further proceedings done, in and about the diſpatch of the ſaid Commiſſion, according as the Law ſhall require, with an intimation as above.

8. Though generally Witneſſes are not admitted after publication, yet in a Matrimonial Cauſe they are admitted, yea without the Oath (that Witneſſes are newly come to the knowledge of the Party producing them, after the Atteſts are publiſhed,) and admit alſo, that Sentence is pronounced againſt the Plaintiff in a Matrimonial Cauſe, that he hath failed in the proof of his Libel, and that the Defendant is abſolved; yet the Plaintiff may (either in the ſame Court, or in any other competent Court) inſtitute a new Matrimonial Cauſe, againſt the ſame perſon, not only upon a new or ſecond contract, but alſo upon the former; and thereupon may produce proofs, whether known or unknown to him at the firſt. And in this caſe, the exception that the matter is adjudged, or that the aforeſaid Sentence hath its effects, upon the matter adjudged, hinders not; becauſe a Sentence pronounced in a Matrimonial Cauſe againſt a Marriage, doth never paſs upon the thing adjudged, ſeeing theſe matters of contract have many priviledges; and as often as the Church is deceived by pronouncing Sentence againſt a Marriage; by new proofs, alſo, nay ſometimes upon the very ſame proofs, the former Sentence may be revoked; the reaſon is, to avoid the Sin and the Danger of the Soul, if an injuſt Sentence ſhould take effect and have place.

9. If the Plaintiff doth perſonally make Faith, that the Woman whom he Sues, doth remain with her Parents, her Kindred, or Friends, who are very much averſe to the Marriage alledged, and that the ſaid *N.* hath not her liberty, ſo as ſhe dare not confeſs the Truth in this Cauſe; and therefore he muſt deſire that ſhe may be Sequeſtred into ſome other indifferent place. Upon which the Judge is wont

wont ( at the Charge of the Party desiring it, ) to Sequester her, for some days appointed at his pleasure, before her examination upon the positions of the Libel, or matter of the Plaintiff; and if upon any emergent Cause, ( appearing by the answers, or proofs, ) it seem fit to the Judge, he may decree her to be kept apart from her Parents and Friends, whilst the Sute depends: And it may be Lawful for the Plaintiff or his Proctor, to convene the Woman so Sequestred, at some convenient time, and read to her the Articles upon which she is to be examined, and admonish her, that when she gives her answer to the same, she speak the Truth, and beware of Perjury. This Practice is very safe; for now adays, when they are released from this Sequestration, they are wont to contract second Marriages, whilst the Sute depends. And observe, that this Sequestration is often decreed upon the bare Oath of the Proctor, alledging his belief as above. And observe likewise, that the Judge may and is wont to impose the Oath judicially to the Party to be Sequestred, ( when she is produced, and before she is Sequestred ) to make a faithful answer, to the Libel, or matter, *&c.* but she is not to be examined, until after she is Sequestred. Also if it be requested of the Judge, he is wont to inhibit the said Woman, over and above, that ( as in the ordinary Citation, in a Matrimonial Cause ) she do not contract any other Marriage, whilst the Sute depends, and if she hath already actually contracted any, that she do not procure the same to be solemnized in the Face of the Church, *&c.* Likewise if the Woman who is thus Sued, ( notwithstanding this dependency of the Sute, and such an Inhibition, not to make another contract, or solemnize another Marriage with any other Man ) doth contract another Marriage, *&c.* this being alledged and proved, she is to be Sequestred ( at the Charge of the Party desiring it ) whilst the Sute depends, and likewise both she, and the man ( if he had notice of such dependance of the Sute ) with whom she contracted this Marriage, are to be punished, and publickly corrected at the discretion of the Judge.

10. And although as was said before, the Woman, ( whilst Sute depends, and notwithstanding such Inhibition, )

on, ) if ſhe contracts any other Marriage, ought to be Sequeſtred whilſt the Sute depends; yet ſome Learned Men ſay, ( and ſo Mr. *Clarke* hath known and had it adjudged ) that if the Man, who doth thus ſolemnize this Marriage with the Woman, knew nothing of this Inhibition, or Sute depending, but did it *bona fide*, ( that is, he ſolemnized the ſaid Marriage, not knowing ought of the Sute, or Inhibition aforeſaid ) in this caſe, he ought not to be puniſhed for the fault of the Woman, ( that is, his Wife ought not to be Sequeſtred from him. ) Therefore to avoid the Deceit, ( which often falls out in theſe caſes ) ſo ſoon as the Citation, and Inhibition are executed againſt the Woman, the Plaintiff muſt take care, that an Intimation and Inhibition be decreed againſt all perſons in general, intimating, Firſt, that there is ſuch a Cauſe depending, betwixt ſuch and ſuch perſons, before ſuch a Judge, and then Inhibiting them, that whilſt the Sute depends they do not attempt to do any thing, in prejudice of the ſaid Sute ſo depending; and theſe Intimations and Inhibition are wont to be made by a decree, *viis & modis*, to be publiſhed in the Pariſh Church ( where the ſaid Woman is wont to Inhabit, ) in time of Divine Service: And then in this caſe if any do contract Marriage with the ſaid Defendant, they cannot pretend themſelves ignorant of the ſaid Sute, for here is a ſtrong preſumption of his knowledge, and he who ſo contracts Marriage with her, is not only to be puniſhed as a contemner, but the Woman is to be Sequeſtred, as in the foregoing number: And this Intimation, and Inhibition may be executed, at ſuch time as the primary Citation, in the Matrimonial Cauſe is executed, or afterwards, before the ſame is returned into Court.

11. It is very uſual, ( ſo ſoon as Sute is commenced in a Matrimonial Cauſe, if the Defendant ( whether Man or Woman ) doth believe that the Plaintiff can prove the Marriage alledged, or at leaſt ſo fully that if no other Marriage is ſolemnized or contracted, the Plaintiff will prevail in the Cauſe, ) the Defendant notwithſtanding the dependence of the Sute, and the Inhibition of the Judge doth contract another Marriage, and procure the ſame to be ſolemnized, being induced thereto by theſe following reaſons.

ons. First, that she believes her Adversary will not (willingly however) obtain an adjudicatory Sentence for a Woman, who (in his opinion) is known by another Man; and upon this supposition, that he will willingly compound, or desist from the Sute. Secondly that the Judge will not in all probability, proceed against this contemner of his meer office no body urging it, or promoting his office. Thirdly, that although the Plaintiff will not compound the Sute, yet the Defendant may so protract the Sute, either by frivolous Allegations and Exceptions, or by Appeals, so as that in the mean time, either Death may terminate the Cause, or the Kings General Pardon may abolish the punishment of this contempt. All these things, the Judge may perchance meet with; which things he ought to take care that they be not committed for the future (at least so frequently.) And this he may do, if (immediately after it doth appear to him, or that he hath any knowledge of this contempt,) he do proceed against these contemners, having no respect to the proofs of the Adversary, nor to the persons contemning, but only to the contempt it self. For a contempt of the Law, and of the Judge, is neither greater nor lesser, whether the contract alledged be proved, or not proved: The Judge also shall avoid these daily contempts; if in the Interrogatories which he Administers against these contemners, he Interrogate them, whether or no any Advocate or Proctor or any Proctors Clerk, or any other Officer or Minister of his own Court especially gave them this Counsel, to solemnize this Marriage or contract: And if any Advocate or Proctor is justly suspected upon this account (for a just suspicion may appear by the Clients Confession) he may be suspended from his office, until he purge himself Lawfully of this suspicion; and if he be convict thereof, he is to be suspended * for a year, or during the pleasure of the Judge.

* *Lindwood. de postuland. c. 1. verb. Matrimonia. ac per totum caput de hac materia in gloss. tractat.*

12. Though every Matrimonial contract, which any one pretends to dissolve a Marriage, (already Lawfully solemnized, and consummate, and confirmed by daily Cohabitation together,) ought to be proved by two Witnesses (at the fewest) who are without all exception, yet this special priviledge, is not allowed to persons who solemnize

lemnize Marriage clandeſtinely, † or Unlawfully, ( that is whilſt the Sute depends, and againſt the Inhibition of the Judge. ) For if this were permitted and ſuffered, or that the ſaid Laws were to take effect in clandeſtine Marriages, there were juſt cauſe given to the perſons in Sute, to contract and ſolemnize Marriage, whilſt the Sute depends, when once the atteſts of the Witneſſes of the Adverſary are publiſhed, that they can inform themſelves, that Sentence will be given for the contract alledged, if they do not contract a ſecond Marriage: And this is indeed frequently done. And indeed of late years, many Advocates and Judges have been of opinion, that the aforeſaid Laws take place, even in clandeſtine Marriages: But Mr. *Clarke* ſays, that to his certain knowledge ( he having been preſent, and hearing it debated in ſome weighty Cauſes, betwixt ſome worthy perſons ) ſeveral Eminent Judges, and Reverend Divines, were of a contrary opinion: One of which Judges, having heard certain of the Learnedeſt Advocates ( eight in number ) who were Feed on both ſides, diſpute touching this queſtion, ( *viz.* whether or no a Marriage, ſolemnized whilſt the Sute depends, and againſt the Inhibition of the Judge, doth enjoy the ſame priviledges, as a * Matrimony which is Lawfully ſolemnized ) and having appointed a time, to pronounce his Definitive Sentence in the Cauſe, and having both the Sentences in his hand, ( that is both the Sentence of the Plaintiff, and the Defendant ) he deſired one of the Learnedeſt Advocates ( of the Party who ſolemnized the Marriage whilſt the Sute depended, ) that he would deliver his opinion ingenuouſly, and ſincerely, ( as in the preſence of the moſt high Judge, ) and anſwer freely which of theſe Sentences he would pronounce in the Cauſe, if he were Judge: Whereupon this Advocate pauſing a little, ( being doubtful as it ſeems what to anſwer ) ſaid at laſt, that if this ſecond Marriage had not been ſolemnized, he would have given Sentence for the Plaintiff, as of right it ought, that is, for the Marriage alledged, and Libelled. Then the Judge ſaid, I approve ( Learned Doctor ) this your opinion; and ſeeing it is ſo, with what Conſcience, or Equity can I be moved to regard this Clandeſtine, and Thieviſh Marriage ( as he was

† *Ligamine prioris conjugii durante ſecundum contractum non valet. Weſemb. parat. ff. de rit. nup. n. 8. colum. 962. Litt. E. Mynſ. Inſt. de nup. Sect. ſi adverſus, de pœnis injuſtæ. nup. n. 3. Lind. de clandeſt. deſponſ. c. quia Sect. omnibus. verb. ſolennem ed. Matrimonium contrahentes impedimento aliquo canonico obſtante filii eorum reputentur illegitimi. & ibid. c. humana verb. impedimenta. canonica, & Joh. Ananias ſuper. 40. decret. de ſponſ. Inſt. Sect. affinitatis de nuptiis.*

* *Quæ ſunt eadem privilegia. vid. Hoſtienſis, qui matrim. accuſare. poſſint. c. videtur. verb. favorabilis, ſuper decret.*

was pleaſed to call it,) and give Sentence againſt my Conſcience, to confirm the aforeſaid illegal Marriage; and thereupon rejecting that Sentence, (*viz.* the Sentence offered for the Marriage, which was ſolemnized whilſt the Sute depended) he pronounced Sentence for the Plaintiff, revoking, and declaring the ſecond Marriage to be null: But upon this queſtion, conſult the Learned Judges and Advocates: Though certainly, if the Laws ſhould deny to allow theſe clandeſtine Marriages, the priviledge of the Juſt and Lawful Marriage, ſo many would not adventure to contract, and ſolemnize ſecond Marriages whilſt the Sute depends, and againſt the Inhibition of the Judge.

13. If the Defendant being Excommunicate and Impriſoned, for not ſolemnizing the Marriage, according to the Sentence of the Judge, doth appear by his Proctor, and the ſaid Proctor (exhibiting his Proxy) doth offer himſelf ready and prepared to take the Oath, of obeying the Law, and ſtanding to the Mandates of the Church, and doth alledge, that his Client is ready and prepared to ſolemnize the Marriage, upon any day to be aſſigned by the Judge, and that therefore he doth deſire, that he may be abſolved from the Sentence of Excommunication until a certain day, or under a Cautele; and then (giving ſufficient Bond, that the ſaid Party will ſo obey the Law, and ſtand to the Mandates of the Church, and alſo that he will ſolemnize the Marriage with the Plaintiff on that day, aſſigned by the Judge for that purpoſe) the ſaid Party is to be abſolved until a day, (*viz.*) until the next Court, immediately following the day aſſigned for the Marriage. And here it is to be noted that although the Defendant, who is Excommunicate (in other Cauſes and Caſes) for any Crime, or Eccleſiaſtical Contempt, is not to be abſolved until he ſatisfie the Mandate of the Judge, as to that thing for which he was Excommunicate: (For example, any one being Excommunicate for not paying Charges, Tithes, a Legacy, and Procurations, is not to be abſolved until he pay them. Alſo any one being Excommunicate in not anſwering to a Libel, is not to be abſolved, until he make his anſwer) yet ſeeing Marriage cannot be ſolemnized by Excommunicate perſons, therefore in this caſe, the afore-

ſaid

ſaid caution being interpoſed to a day, or under a a Cautele, and the aforeſaid Oath being taken, of obeying the Law, *&c.* the Excommunicate perſon is firſt to be abſolved ere the Sentence can have its effects.

14. If in a Matrimonial Cauſe, the Plaintiff doth prove a Matrimonial contract, by one ſufficient Witneſs, who is without all exception, and doth prove a treaty by others; or doth prove an acknowledgment by two Witneſſes, the parties being preſent (Mr. *Clarke* ſays he has ſeen a condemnation of Charges, where the Plaintiff hath proved by two Witneſſes an acknowledgment, though in the abſence of one of the Parties, ſo as the treaty of Marriage were proved) or if he proves a contract for a future Marriage, by two Witneſſes, and a treaty by the ſame or other Witneſſes; or doth prove an immediate Marriage by two Witneſſes, and theſe proofs are afterwards taken away, by Lawful exceptions unknown to the Party producing them; or if the proofs of the Plaintiff are made difficult, that is, if the Witneſſes do ceaſe to be without all exception, by reaſon of a former contract or Marriage, or by a ſubſequent ſolemnization of a Marriage made whilſt the Sute depends; in theſe caſes, the Judge is wont (although he have pronounced Sentence for the Defendant) to condemn the ſaid Defendant, ſo obtaining the Sentence, in Charges made by the Plaintiff. But if it is proved that there was a treaty made (and often reiterated) as well of the Marriage, as of the Dowry to be aſſigned, and a mutual giving and receiving of Rings, in this caſe, the Judge is wont to abſolve the Plaintiff from Charges of Sute, ſeeing he may be ſaid to have juſt cauſe of conteſting *.

15. A Sentence being pronounced in theſe Cauſes, for a Marriage, the Defendant is to be called to ſhew Cauſe, why the Sentence already pronounced, may not be put in Execution: And that a verbal Execution may be made, it is to be proceeded as in other Cauſes, when Sentences are verbally put in Execution; and after Sentence is demanded to Execution, a Monition is to be decreed againſt the Defendant, in order to cauſe him (or her) to ſolemnize the Marriage with the Plaintiff, before ſuch a Feaſt, or otherways the ſaid Defendant is to be cited to appear on ſuch

* *Lanfranc. c. quoniam de exſpenſ. n.* 2. & *n.* 3.

ſuch a day, after the ſaid Feſtival is elapſed, to ſhew cauſe why he may not be Excommunicate for his (or her) contumacy. Then the Party deſiring the Marriage to be ſolemnized, muſt procure a Licence or Diſpenſation, in order to the ſolemnizing this Marriage (without publiſhing the Banes) in any Church. Then the Plaintiff muſt go to the Defendant, and requeſt him to this Marriage, and appoint ſome certain day for the ſolemnizing thereof: And if he or ſhe cannot meet with the Defendant to ſpeak with him in order to this, let them ſend ſome other perſon who are likely to meet with him. And if the Defendant will not appoint a day for the celebrating this Marriage, nor will return any anſwer to the Plaintiffs requeſt, then the Plaintiff muſt appoint to himſelf, ſome Lords day, or Feſtival, on which he may indeavour to procure this Marriage to be ſolemnized in ſuch a Church, and this his intention he ought to ſignifie perſonally to the Defendant, or at leaſt he ought to proteſt the ſame, before Witneſſes; then on that day appointed, the Plaintiff muſt go to the Church which was appointed for this purpoſe, and muſt take care, that a Miniſter be there ready, expecting the coming of the Defendant, in order to ſolemnize the Marriage and if the Defendant comes not, the Plaintiff muſt proteſt his diligence and preſence, *&c.* before theſe Witneſſes.

16. Upon the day aſſigned for the return of the aforeſaid monition; the ſame is to be certified to the Judge, with a Certificate indorſed thereupon, making mention of the due Execution thereof. And for a further Cautele, the requeſt which was made to the Defendant, to ſolemnize this Marriage, and the aſſignment of a day, and all other the premiſſes may be alledged, and the Plaintiff muſt make Oath thereof: Then the Contempt of the Defendant muſt be accuſed (being admoniſhed to ſolemnize the Marriage upon ſuch a day, or to appear on ſuch a day and in ſuch a place, to ſee himſelf Excommunicate, and not taking care to ſolemnize the Marriage, nor to appear nor alledging any Cauſe, why he may not be Excommunicate;) Then the Judge muſt cauſe the Defendant to be called three times publickly, and if he appear not, he is to be pronounced

pronounced contumacious, and is to be decreed Excommunicate, and is to be proceeded againſt, as in other Eccleſiaſtical Cauſes. And if the Defendant is caſt into Priſon, upon the Kings Writ, *de Excommunicato capiendo*, he is there to be kept until he ſolemnize this Marriage, and ſatisfie the Church for his contempt.

17. Now the Defendant refuſing to ſolemnize the Marriage notwithſtanding the Oath, or Bond which was given to ſolemnize this Marriage, with the Plaintiff, upon the day appointed by the Judge, (under colour whereof, the ſaid Defendant hath got an abſolution to a day, or under a Cautele) in this caſe, how the Defendant muſt be proceeded againſt, is a thing very much controverted (*Scil.*) whether or no the Judge (by vertue of the firſt Excommunication, which was denounced) can ſignifie the ſaid Defendant to the Kings Majeſty, and obtain a Writ for his apprehenſion, (ſeeing he was abſolved only to a day, and that day being elapſed, he doth again fall under the former Excommunication,) or whether or no the Judge ought *de novo* to admoniſh the Party again, to ſolemnize the Marriage before another day, under penalty of Excommunication, and then proceed to denounce the Excommunication, and do all other matters and things, in like form as was directed in the fifteenth number foregoing. Mr. *Clarke* ſays, he always uſed the laſt method of proceeding, and he accounts it moſt ſafe ſo to practiſe in this caſe, to remove all jealouſies. And ſeeing in the aforeſaid caſe, the Judge was circumvented by the Defendants promiſing that he would ſolemnize the Marriage, (under colour whereof he got his abſolution,) and ſeeing he was a manifeſt contemner of the Judge, and of the Jurisdiction of the Church, the Judge may, and of right he ought to give the Party (who is thus grieved and injured by the fraud of his Adverſary, and by this retarding the Sute) the Bond (which was taken for the ſolemnizing this Marriage, before a certain day) and make him a Letter of Attorny, for the recovering the Forfeiture of this penal Bond, at the common Law; and this is eſpecially neceſſary to be done, if the Party (after he is freed out of Priſon, by vertue of the ſaid abſolution to a day as above) doth ſo

abſent himſelf, as that the Plaintiff cannot cite him *de novo*, to the effect aforementioned: And then the Bondſmen for their own ſafety, will cauſe the ſaid Party to ſtay in Court, *&c.*

18. In all Cauſes which concern the Goods or Perſon of any one, a third Perſon may come in for his Intereſt (to wit) in a Matrimonial Cauſe, a Cauſe about a Living, a Teſtamentary Cauſe, a Cauſe of Temerary Adminiſtration. And Firſt, in a Matrimonial Cauſe; If a Man Sue a Woman in a Cauſe of contract, and that Woman doth either ſolemnize, or contract Marriage with another; this third perſon may (if he will) come in for his Intereſt in the ſaid Cauſe, in any part of the proceedings, yea though the Cauſe be concluded, whether he come with an intention to aſſiſt or remove the Defendant, yea although he may have notice that the Sute hath depended, and that the Plaintiff has proved his Libel, *&c.* the reaſon is, becauſe this Cauſe is a Cauſe of great priviledge; and in theſe Matrimonial Cauſes, it is controverted as to the peril of the Soul; and therefore the publication of the Witneſſes, and the concluſion in the Cauſe, doth not hinder, but that a third perſon (alledging a former contract, and a Firſt Marriage, and making Oath, that he doth not propound this his intereſt, out of a malitious mind, or with an intent of deferring the Sute, and that he believes he can prove the ſame) may be admitted to alledge, propound, and prove this his intereſt, notwithſtanding the Witneſſes are publiſhed, and the Cauſe concluded. But in the other caſes above mentioned, a third perſon coming in for his intereſt, ought and is wont to proceed in the ſame State, in which the Cauſe was, at the time of his coming in; and the proceedings ought not to be ſtopt, but the Plaintiff may proceed againſt the Defendant, as if a third perſon had not come in for his intereſt: But this is only to be underſtood, where that third Perſon doth come to aſſiſt the Defendant: For it is otherwiſe, if he comes in, with an intention to remove the Defendant, who makes a colluſion with the Plaintiff in prejudice of the ſaid third perſon. For in this caſe, this third perſon may ſtay the proceedings againſt the Defendant; yet it is meet, that this third perſon do ſpecifie this

this colluſion in his Allegation, and the Cauſes wherefore the Defendant is to be removed: Nor is it ſufficient (as Mr. *Clarke* has heard from very Learned Perſons) that this third Perſon do alledge generally, and in the common form in his Allegation, (*viz.*) *Omnibus melioribus & efficacioribus, via, modo & juris forma*, &c. but he muſt alledge in theſe general words, (*viz.*) *Et præſertim animo removendi reum; & detegendi colluſionem inter eum & Actorem, in præjudicium iſtius tertii.* Alſo in a Cauſe about a Living, or Benefice, to wit, in a buſineſs of double querele, if it is conteſted for a Benefice betwixt a Biſhop and another Clergy Man, (who is preſented to it,) who doth deſire his Inſtitution inſtantly: Becauſe ſometimes the Biſhop will not alledge thy right, (that is, that a third perſon doth poſſeſs this Benefice already, and that the Church is not vacant, in reſpect of this third perſon;) in which caſe the Judge to whom it is complained, is wont to pronounce for his Juriſdiction, and to decree the Party complaining, to be Inſtituted to the ſaid Benefice: Therefore it is expedient in this caſe, that this third perſon who has the Living already, do come in, and alledge his intereſt, leſt another be inſtituted to the ſame. Likewiſe if in a Teſtamentary Cauſe, (where there are conſiderable Legacies left you,) the Executor of the Will, intending to make void this Will, in which theſe Legacies are left, and to get it declared as null by the Sentence of the Judge, and ſo avoid the payments of theſe Legacies; in order thereto this Executor is wont to collude, (at leaſt he may ſo do) with ſome of the next of Kindred to the deceaſed (who would have had an intereſt in the Goods, if the deceaſed had made no Will) to call this Executor, to prove this Will by Witneſſes: And the Executor (thus colluding) making default in the proof thereof, he may obtain Sentence againſt the Will, although for form ſake, he have alledged the Will, and taken upon him to prove the ſame by Witneſſes. And this may alſo be done, if the Executor is not called by, but doth call the next of Kindred, (who do collude with him,) to ſee the Will proved by Witneſſes, *&c.* in this caſe, the Legatee concerned may come in. To theſe caſes may alſo be added a Cauſe Inſtituted for a Legacy: For the Executor not having

ving ſufficient Goods to pay the whole Legacies, yet being willing that the reſidue which is in his hands, ſhould be paid to the Kindred, and Friends who are Legatees, he may collude with ſome one or more of theſe Legatees, and get them to Inſtitute an Action againſt him for theſe Legacies, and may obtain the Sentence of the Judge for the whole Legacy: In which caſe the Executor is freed by the Sentence of the Judge, if he pay theſe Legacies adjudged: Which being paid, he hath fully Adminiſtred, ſo as there remains nothing more to pay the other Legacies. But yet quære whether or no the Executor (knowing in this caſe that there are more Legacies due,) ſhall be freed by this Sentence. Mr. *Clarke* ſays, he has known it thus adjudged. It is very requiſite therefore that the other Legataries, (ſo ſoon as they have notice of theſe colluſions) do come in for their Intereſt in the ſame Court, or Cauſe ſo Inſtituted, and deſire their Legacies, or at leaſt that they may have a ſhare out of that reſidue of the Teſtators Goods (which remain in the Executors hands) according to the rate and quantity of their Legacy.

## SECT. 2.

## Of Divorces.

1. *The manner of deſiring Charges of Sute and Alimony in any Matrimonial Cauſe, betwixt a Husband and a Wife.*
2. *A neceſſary clauſe to be inſerted in the Libel, when the Wife ſues her Husband,* &c.
3. *The tenor of a Sentence in a Cauſe of Divorce, or rather in a Cauſe of Separation from Bed and Board, in caſes of Adultery or Cruelty.*
4. *The Cauſes which are to be conſidered by the Judge in a Cauſe of Divorce for Adultery.*
5. *The Cauſes which hinder a Separation, although the Party convened hath committed Adultery.*
6. *The Cauſes which hinder a reſtitution in a Matrimonial Cauſe.*

IN

IN every Cauſe where the Wife ſues her Husband, (or contrarily) ſo ſoon as it doth appear to the Judge, either by the anſwers of the Proctor of the principal Party, or by the Proofs, that the Marriage was ſolemnized betwixt the Parties, the Proctor of the Woman muſt alledge, that it doth appear by the Acts of the Court, by the Libel of the Adverſary (when the Man ſues his Wife in a Cauſe of Divorce, or in a Cauſe of reſtitution of the conjugal Yoak) or by the anſwers of the Proctor, or of the principal Party, that the Marriage was ſolemnized betwixt his Client, and *M.* the Adverſe Party, referring himſelf to the Acts, the Anſwers, the Libel, or the Witneſſes Examined in that behalf; wherefore he muſt deſire that the ſaid Husband may be condemned in Charges of Sute, and Alimony; then if the Marriage thus alledged doth appear to the Judge he is wont to condemn the Husband, according as is requeſted. Then the Proctor of the Woman muſt give the Judge a Schedule of the Charges of Sute, at the end of which Schedule, he muſt Write on this manner, (*Scil.*) 'And the ſaid Party *N.* doth deſire Charges of Alimony, 'from the day of the date of the primary Citation, for and 'during the whole Sute, according to the rate *. (Leaving a ſpace, that the Judge may ſet down the ſum, which is to be decreed for every week from the aforeſaid time, until the end of the Sute.) Then the Judge muſt firſt Tax the Charges of Sute; and then if the ability of the Husband doth appear to him, he may Tax the Charges of Alimony at his pleaſure, on this manner: 'We Tax the Charge of 'Alimony for every week, from the time of the date or re- 'turn of the primary Citation, (if he ſee it convenient) 'to ſuch a Sum to be paid during the dependance of this 'Sute, unleſs it ſhall be otherways decreed by us. For it is to be noted, that the Adverſary may in any part of the Sute, (to avoid a further Allowance or Taxation of the charge of Alimony) however that they may be moderately taxed, alledge and prove his poverty, or that he is decayed in his Eſtate, ſince the decree of the Judge was interpoſed for theſe Charges of Alimony; but the Judge ought to take heed, that he be not circumvented in the aforeſaid

* *In taxatione alimentorum conſuetudo & qualitas ejus cui aſſignantur, ſint conſideranda Marchi Sol. Recol. qu. 10. n. 8. q. 74. n. 4. Jacob. Fab. de aliment. Pontan. de aliment. quæ vocantur alimenta Mynſ. Inſt. de Action. Sect. Item ſi n. 4. & obſerv. Cameral. cent. 3. obs. 12. Guid. Pap. deciſ. 439.*

taxation, (to wit, from the day of the date of the Citation) for ſometimes the Plaintiffs take out the Citations, but do defer to Execute and Certifie them, of a years time or thereabout, afterward: Which fraud being found out by the Judge, he may Tax the Charges of Sute, and allow Alimony from the day of the bringing in, or return of the Citation.

2. The Proctor of the Wife may propound, and alledge in his Libel, the value of the Goods, which the Husband had as a Portion with his Wife, at the time of Marriage, and the value of all ſuch Goods as the Husband doth poſſeſs, that a certainty of the value may appear by the anſwers of the Husband, and that thereby the Judge may be informed as to the ſum to be Taxed. The Judge may alſo be informed of the Ability of the Husband, by the relation of the Neighbours, or ſome other way. And although the Husband doth offer himſelf ready and prepared to prove that his Wife is an Adultreſs, or that ſhe hath otherwhere to maintain her ſelf withal ſufficiently, and to pay the Charge of Sute; and admit that the Husband doth prove theſe alledgments by Witneſſes, or that the Witneſſes do fully depoſe, that theſe alledgments are true: Yet the Judge ought to allow theſe Charges of Sute, and this Alimony, unleſs it be concluded in the Cauſe; for nothing can be ſaid to be proved, ſo long as any thing can be Propounded and Proved by the Adverſe Party. For the Learned Civilians ſay, that nothing is ſaid to be proved, before the Sentence is Pronounced, at leaſt ſo long as the Adverſe Party may except againſt the Witneſſes. But *quære.* Now the Charges of Sute and Alimony being Taxed, the Judge is wont to decree a Monition for the payment of them, as in other caſes. And obſerve, that in the aforeſaid Taxation of Alimony, the Judge is wont to allow the Wife a third, or at leaſt a fourth part of the yearly value * of the Land, or immoveable Goods; and if the Husband hath no immoveable Goods, then the Charges are to be Taxed according to the common Account of the value of the moveable Goods, and according to the Quality of the Husband, as ſhall ſeem fit to the Judge.

* *Myns. Inſt. de Action. Sect. Item ſi. n. 5, 6. ac per tot.*

† *Vide quæ ibi notantur in Marg.*

3. Now although it was ſaid at the firſt number † of the fore-

foregoing Section, that a Husband or Wife, for ſeveral reaſons might ſue in a Cauſe of Divorce or Separation from Bed and Board; yet by the Canon Law, which is approved and confirmed by the Laws of this Realm in this behalf, it is not Lawful for perſons who are Divorced in theſe caſes, (*viz.* either for Adultery or Cruelty,) to betake themſelves to a ſecond Marriage whilſt their former Husband or Wife are alive; becauſe the Matrimonial Bond of a Matrimony once perfected, cannot be diſſolved by Man, but only by Death. Therefore in every Sentence Pronounced in theſe caſes, this Clauſe is inſerted: (The ſaid *N.* and *M.* that is, the Parties, who deſire to be Divorced by reaſon of Adultery [if the Cauſe were inſtituted for Adultery] or by reaſon of the Cruelty Alledged and Proved, we Separate and Divorce them from Bed, Board, and mutual Cohabitation, and from the Yoke of Wedlock, until ſuch time as they are mutually reconciled to each other, and not otherways, nor in any other manner. (This word *Divortiamus* is often admitted.) Alſo to avoid theſe ſecond Marriages, whilſt the former Husband or Wife are alive, (being a thing frequently done) the Judges are wont expreſly to Inhibit theſe perſons thus Separated, that they do not betake themſelves to any other Marriage, with any other perſons, during the Lives of them two thus Separated, with an Admonition alſo, that they abide Unmarried, unleſs they be mutually reconciled to each other. And as often as it is complained of theſe ſecond Marriages (of either of theſe Parties thus Separate,) before the Kings Chief Commiſſioners in Eccleſiaſtical Cauſes, or before the Judges of the Arch-biſhop of *Canterbury*, the Parties who offend in theſe caſes, are Puniſhed and Corrected, and are Divorced and Separated from theſe ſecond Marriages, or rather from theſe Adulterous Wedlocks.

4. Seeing that in theſe our days (through the Inſtigation of the Devil) very many Divorces are asked, or ſued for under pretence of Adultery; that ſo by that means, the Parties thus Separate, may betake themſelves to a ſecond Marriage. And that this Divorce may be the eaſilier obtained, the Wife is wont to confeſs the Adultery,

whereof she (under colour) is accused; though in very deed there was not any Adultery committed. Sometimes also the Husband (that so he may Marry another Wife,) doth (either by threatnings stripes, or fair words, or some other unlawful means) induce his Wife to confess Adultery, although she never committed any; therefore to remedy and avoid this deceit and fraud, the Judge in these cases, is wont (all persons being removed apart, and especially the Husband) secretly to question some Friend of the Womans, and also examine the Woman her self, diligently touching the Truth, and the Cause of this her confession; and use all other lawful ways and means to inform himself of the truth. And if he can find out this deceit and fraud, or at least if he finds any probable suspicion of it, he is wont to forbear to pronounce a Sentence of Divorce, unless the Party who desires this Sentence of Divorce, doth prove this Adultery by Witnesses, or at least by vehement presumptions, and publick fame; or unless the Judge is satisfied in his conscience, of the probability of this crime being true, as objected; so as he can believe that the confession of the said Woman, touching the Adultery committed, did not proceed from her out of deceit or fraud. The Judges also had need take care that the person brought before them, to confess the Adultery mentioned in the Libel, be not some counterfeit person (which Mr. *Clarke* says, he has known twice done in his time) though it be Alledged before him, that that is the Wife of the Man who desires to be Divorced. Therefore the Judge shall prevent this deceit and fraud, very easily (if he suspects it) by taking care to get some persons of credit, to be present before him, (at the time of Pronouncing in the Sentence) who have certain knowledge of the Woman confessing this Adultery, *&c.*

5. A compensation of the crime, doth hinder a Divorce, that is, if the Defendant doth prove, that the Plaintiff hath also committed Adultery, the Defendant is to be absolved, as to the matters requested in the Libel of the Plaintiff. Likewise if an Action of Divorce for Adultery, is instituted by a Woman against her Husband, or by a Husband against his Wife, to obtain a Divorce for Adultery:

tery, if the Defendant in this caſe, doth Alledge and Prove, that the Plaintiff (before this Sute was inſtituted) had knowledge, or at leaſt a probable foreſight of this crime Committed, and Libelled, and yet notwithſtanding this, had afterward a carnal Commerce with the Defendant; the Plaintiff in this caſe, ſhall not obtain a Sentence of Divorce: Becauſe in this, the Plaintiff may be ſaid to have remitted, and pardoned the crime objected. Now a probable knowledge in this caſe, may be ſaid to be, if the Husband ſuſpecting his Wife of Adultery, doth accuſe her of it, and ſhe confeſſeth it when Taxed therewith: Or if thoſe Witneſſes, whom the Husband produceth in a Court of controverſie, to prove this Adultery objected, did ſignifie to the Husband before the Sute was begun, that they could depoſe or teſtifie this Adultery, having ſeen and known the ſame to be committed: Or if the Husband took his Wife in the very Act of Adultery: In theſe caſes, if the Husband hath carnal knowledge of his Wife afterwards; he doth ſeem to remit the Injury, and therefore ought not to be Separated from his Wife. Therefore in this caſe, let the Husband forbear to lye with his Wife, (if he intends to be Divorced from her) although he doth not immediately put her out of his houſe.

6. Proof being made that (after the Marriage is Contracted, or ſince the Marriage was Solemnized, and that the Wife went from her Husband, or the Husband from his Wife,) the Husband, or the Wife have committed Adultery, it is ſufficient to hinder a Reſtitution in a Matrimonial Cauſe: Yet in this caſe, if the Plaintiff doth reply, and prove a compenſation or knowledge, a pardon or a remiſſion of the crime as above; he ſhall obtain the Reſtitution as deſired. The Cauſes alſo which are mentioned in the firſt number of the foregoing Sect. may be propounded to hinder this Reſtitution; being ſuch as render the Marriage (already Contracted) Null.

CHAP.

## CHAP. II.

### *Of Contempts † againſt the Eccleſiaſtical Laws, and Magiſtrates. The order of puniſhing them.*

† *Contumacia quæ ſit, & quis dicatur contumax quot modis committitur, qualiter contra contumacem procedatur, quæ pœnæ contumaciæ, & quo ordine ſint infligendæ, plenius reperias apud Alciat. in prax. à fol.* 86. *ad fol.* 100. *etiam Hoſtienſ. t. ſi quis jus dic. in ſum. n. i. de contum. Ummius diſput. 6. n.* 3. *Ord. Cameral. p.* 3. *tit.* 41. *Jacob. Blum. proc. Cam. t.* 66. *Jacob. Ayrer. proceſſus p. i. c.* 4. *obſ.* 3. *n.* 6. *contumacia eſt erga judicem commiſſa inobedientia.*

### SECT.

1. *The manner of deſiring a Decree, in a matter of Contempt, committed in a Matrimonial Cauſe.*
2. *The manner of Alledging a Contempt in other Cauſes.*
3. *The manner of Proceeding in a Cauſe of Contempt.*
4. *The manner of Giving and Exhibiting Articles in a Cauſe of Contempt.*
5. *The manner of Proceeding in theſe Cauſes, where the Defendant doth confeſs the Contempt.*
6. *The manner of Proceeding in this Cauſe if the Defendant doth deny the Articles.*

THE Proctor who deſireth a Decree, and a Citation to be decreed in a Cauſe of Contempt, ought to draw up a Schedule, containing briefly the Cauſes of Contempt: Which Schedule, he who is Advocate in the Cauſe, is wont to read publickly in Court, it being drawn up under this form of words. 'Reverend Judge; from this famous Court, were taken certain Letters Citatory and Inhibitory at the inſtance of one *N.* againſt *M.* to anſwer the ſaid *N.* in a Matrimonial Cauſe, and to Inhibit the ſaid *M.* the Woman that ſhe ſhould not (whilſt the Sute depends) Contract any other Marriage; and that if in caſe, ſhe ſhould have Contracted any, that ſhe ſhould not procure the ſame to be Solemnized in the face of the Church, under penalty of the contempt of the Law, and that theſe Letters Inhibitory, were duly executed upon the ſaid *M.* according to the form, force and effect of the ſame. And that notwithſtanding theſe your Letters Inhibitory, and the Execution of the ſame, the ſaid *M.* (in contempt of the Law, and of your juriſdiction) hath Contracted a certain pre-

'pretended Marriage with one *O.* and hath procured the 'ſame to be Solemnized in the face of the Church, *&c.* Where-'fore I deſire that the ſaid Party may be cited to appear 'upon ſome competent day, to be by you aſſigned, to 'anſwer perſonally to certain Articles, concerning this con-'tempt towards you, and your juriſdiction. Then the Judge doth decree the ſaid Party to be called to anſwer perſo-nally againſt ſuch a day as is deſired.

2. In other caſes, the Schedule for a contempt, is to be drawn and read (as above) by an Advocate, in theſe words: 'Reverend Judge; from this Court were taken 'certain Letters Citatory, at the inſtance of one *N.* againſt '*M.* to anſwer the ſaid *N.* in a Cauſe of Defamation, or the 'like: And that theſe Letters Citatory were Sealed with 'the Seal of your Court, and in order to the Execution of 'the ſame, they were delivered to one *L.* your Mandatory, 'lawfully conſtituted in this behalf. And that your ſaid 'Mandatary, did execute this Mandate upon the ſaid *M.* 'and that the ſaid *M.* violently ſnatched this Mandate out 'of the hands of your ſaid Mandatary, (in contempt of your 'Court and Juriſdiction) and tore the ſame: And likewiſe 'at that time, and by reaſon of the Execution of this Man-'date, he not only uttered reviling words againſt the ſaid 'Mandatary, but alſo beat and ſmote him with a ſtaff, (or 'ſome ſuch like thing, according as the matter was: Al-'ways adding) that this was done by reaſon of the Execu-'tion of the Mandate of the Judge, and in contempt of the 'Eccleſiaſtical Law, and its Juriſdiction; (leſt it ſhould be 'pretended, that this buſineſs doth belong to the common 'Law) and I do deſire (as above in the foregoing number; and the Judge ought alſo to decree as was ſpoken there.)

3. Againſt the day of the return of the Citation, the Proctor promoting this matter of Contempt, muſt take care to draw up into Articles, the Cauſes of this contempt, in the name of the Judge, by way of Objections. (*viz.*)

In he Name of God Amen. *We* N. *official*, &c. (here recite the ſtyle of the Judge, who adminiſters theſe Interrogatorie) *do give and adminiſter to you* M. *all and ſingular theſe Articles, or Interrogatories* (*which concern a contempt*

*contempt offered to us, and to our Juriſdiction) of our mere Office, or at the promotion of* O. (if the Judge has no mind to proceed of his mere Office) *to each, and every part of which Articles, we will, and require you the ſaid* M. *to make a true, a plain, a full, and a faithful anſwer, (upon your corporal Oath) and we do Object and Article, joyntly and ſeverally as follows,* &c.

4. If the Judge intends to proceed of his mere Office, he ſhall aſſign ſome Proctor of his Court, as a neceſſary Promoter of his Office, who muſt ſay, 'I take upon me the 'burthen of Promoter of the Office of the Judge, and I do 'give and adminiſter Articles, and deſire that it may be 'proceeded ſummarily and plainly. Which the Judge decrees. And then the principal Party is to be produced upon theſe Articles, if he be preſent in Court. But if the Office of the Judge, is promoted by a voluntary Promoter, or his Proctor (who muſt Exhibit his Proxy for the ſaid Promoter) he muſt ſay, I give Articles, and upon theſe Articles, I produce the principal Party, here preſent in Court, whom the Judge muſt ſwear to make a faithful anſwer, to the ſaid Articles, againſt the next Court, and admoniſh the ſaid Party, to appear at the next Court to acknowledge his Anſwer; this acknowledgment is wont to be made in the preſence of the Proctor of the Party who promotes the Office. And obſerve that in theſe matters of contempt, whether moved of the mere Office, or by a Promoter, it is not lawful for any Proctor to appear for the Contemner, nor for any Advocate to plead in his behalf, until the ſaid Defendant has given his anſwer: Nor then neither, until the Judge his leave be firſt asked and obtained; nor ſhall the Defendant have a Copy of the aforeſaid Articles, before he be examined upon them. Yet here it is to be noted, that although it was ſaid above, that if the voluntary Promoter of the Office, be not preſent in Court to give in the Articles; his Proctor having Exhibited his Proxy for him, may give in thoſe Articles: Yet Mr. *Clarke* doubts very much, whether or no in this caſe, where the Office is voluntarily promoted, or whether or no, in a Cauſe of Correction, originally moved at the inſtance

inſtance of any one, a voluntary Promoter can conſtitute a Proctor, before Sute is conteſted? Becauſe a voluntary Promoter, although he have ſufficient Intereſt to promote, and in this caſe to implore the Office of the Judge, that a crime may be puniſhed, being alſo of publick concern; yet *quære*, whether or no this promoter can conſtitute a Proctor to carry on the Sute, before the Sute is conteſted, and whether or no the Acts and things done by ſuch a Proctor, are of any force? Mr *Clarke* thinks they are of no effect; and he is induced to believe ſo, becauſe that above five years ago, he very erroneouſly gave in Articles in the Name, and by vertue of a Proxy, from the Promoter of the Office; and at his Petition, Sute was conteſted by the Proctor of the Adverſe Party: Which being done, he began to doubt with himſelf, whether or no theſe things thus done by him, as Proctor of the ſaid Promoter, were of any effect. Therefore he conſulted two Advocates (who were feed in the Cauſe,) upon this queſtion; who making ſome doubt herein, deliberated upon it for a day or two; and then returned him anſwer, that all things ſo done by him as Proctor of this Promoter, before the Sute was conteſted were void. * Whereupon in purſuance of their counſel and advice, he ſubducted and deſired that all things done in Court by him, as Proctor of the ſaid Promoter, might be accounted as ſubducted: And he offered himſelf ready to pay all ſuch charges as were due, and ſhould be Taxed by the Judge, by reaſon of this Nullity; which Subduction, the Proctor of the Adverſary accepting Mr. *Clarkes* Clyent was condemned in charges, which the Judge Taxed to forty Shillings; which were alſo paid down by Mr. *Clarke*. And then the voluntary Promoter appearing perſonally in Court, he gave in the Articles, already Exhibited in preſence of the Proctor of the Defendant, and deſired that an anſwer might be given to the ſame. And then Sute being conteſted, the ſaid voluntary promoter, conſtituted and appointed Mr. *Clarke* for his Proctor: And afterwards he obtained Sentence in the ſame Cauſe, with charges, and a publick Penance was injoyned the Defendant.

5. If the Defendant confeſſeth the contempt objected, then

* *Nonne eadem eſſe videtur Analogia inter procuratorem ad litem & promotorem officii? Si ita ſit certe procurator à promotore litis non magis quam à procuratore ad litis ante conteſtationem litis, conſtituitur. Alciatus in prax. fol. 53. Sect. quando contra procuratorem opponatur ratione conſtituentis. verſ. ſeptimo.*

then the Proctor of the Party promoting the Office, (an acknowledgement being made of the answers of the principal party) must first accept these answers, so far as they make on his part, and on behalf of the Office of the Judge, and must alledge, that the intention of the Judge, and of the Party promoting the Office, (mentioned in the Articles of contempt,) is sufficiently founded upon the answers of the Defendant, referring himself to those Articles, Answers, and to the Laws: Wherefore he must desire, that the said Party may be pronounced for a Contemner, and that Penance may be enjoyned him, that also he may be condemned in charges, and that right and justice may be done: From which Petition, the Defendant dissents, and denys the matters alledged by the promoter. Then the Judge assigns to hear his pleasure, upon this Petition, and to hear his final Decree upon the next Court day; or the Judge may if he will, upon that same day, in which the Defendant acknowledged his Answers, if the intention of the Office is sufficiently founded thereby (the aforesaid Petition being made by the promoter of the Office) pronounce him a Contemner, and enjoyn him Penance, and condemn him in charges. For observe as above, that by the Custom and Statutes of this Court; these Causes are Summary Causes, (at least they are usually summarily proceeded) and a contrary defence is seldom admitted against the Confession or Proofs, which make for the intention of the Judge or his Office, (although the Party confessing would perhaps qualifie or extenuate that Confession) nor is the Defendant permitted to except against the Witnesses that are examined on behalf of the Office, in order to make his Penance the more easie.

6. If the Defendant doth deny the Articles of Contempt, the Proctor of the Party promoting the Office, (whether he be voluntary or necessary) may desire a Term to be assigned him, to convince the Defendant; which Term so assigned, is instead of the Term Probatory: And proof being made, they must proceed in all things, as in a Summary Cause. And observe as above, that these Causes are said to be favourable Causes, and there is not so

full

full and direct proof required in theſe, as in other Cauſes. For ſometimes there is no further proof required, than the ſole Oath of the Mandatary, at leaſt if he be a publick Mandatary, and one who is of honeſt account, eſpecially if any other circumſtances or preſumptions occur. And if the contempt is proved, the Party promoting the Office, muſt deſire a Term to be aſſigned, wherein the matter may be diſcuſſed, and the final Decree may be heard. Then the Judge (concluſion being made in the Cauſe, as in other ſummary Cauſes) may pronounce Sentence againſt the Contemner, to the effect above ſpecified, or he may by his Interlocutory Decree, pronounce as above.

CHAP.

## CHAP. III.

*The manner and order of an Executor or Administrator making their Accounts. When called thereto.*

### SECT.

1. *Of the Oath of the Party Accounting upon those Sums which are under forty Shillings.*
2. *The general Oath of the Party Accounting upon all the Sums contained in the Account.*
3. *In what case a Party who is called to give an Account, or to Exhibit an Inventory, is not bound to appear personally, but may appear by his Proctor, to object that the Party calling him to an Account, has no Interest.*
4. *What persons are said to have Interest to call the Executors or Administrators, to Exhibit Inventories, and make Accounts.*
5. *The manner of proving the Interest of a Creditor, if it be denyed.*
6. *Of other persons that have Interest to call the Executors or Administrators to an Inventory, and an Account.*
7. *The Party who is called to give an Account, whether of the Office of the Judge, or at the instance of a Party, ought to appear personally.*
8. *The Executors or Administrators may call the next of kindred to the Deceased, to see an Account given, and the Letters of* Quietus est, *or Acquittance granted, upon the full Administration.*
9. *The manner of justifying and proving an Account by Witnesses.*
10. *The form of drawing an Account, (whether of the Office of the Judge, or at the instance of a Party) in a Court of Controversie.*
11. *The manner and form of alledging the insufficiency of the Goods in a Court of Controversie.*
12. *The Party Accounting, in order to prove the Estate and Ability*

*Ability of the Deceaſed, ought to Exhibit an Inventory of the Deceaſeds Goods, in a Court of Controverſie.*

13. *The manner of objecting againſt an Account.*
14. *The benefit of drawing, and judicially exhibiting an Inventory.*
15. *In what caſe, the Party Accounting, or his Proctor, may decline the Judge of the Prerogative Court, and except that he is no competent Judge.*
16. *The manner of alledging and proving the Juriſdiction of the Prerogative Court.*
17. *The manner of Adminiſtring an Oath to the Party Accounting upon the leſſer Sums, by vertue of a Commiſſion granted to remote parts.*

IF an Executor or an Adminiſtrator is called to give an account, at the inſtance of any perſon having Intereſt in that behalf; or if it is Sued in a Cauſe of Legacy, and the Defendant in that caſe, doth alledge the inſufficiency of the Goods; if the Executor or Adminiſtrator hath diſburſed ſeveral Sums of Mony, which are under forty Shillings; theſe Sums are to be allowed upon the † Oath of the Party Accounting, on this manner 'N. hath appeared 'perſonally, and without any intention of revoking his Pro-'ctor, hath made Oath, that he hath diſburſed all and ſin-'gular thoſe leſſer Sums, mentioned in the Account, not 'exceeding the Sum of forty Shillings; wherefore he hath 'deſired that theſe Sums might be allowed, and that right 'and juſtice may be adminiſtred and done him. Then the Judge (adminiſtring an Oath to the Party Accounting, upon the truth of this Allegation, (*viz.*) that he hath diſburſed theſe leſſer Sums, and this Oath being taken by the ſaid Party Accounting) he muſt ſay, 'We allow to the 'ſaid N. the Party Accounting, all thoſe leſſer Sums, not 'exceeding the Sum of forty Shillings, ſo as he be not de-'tected of deceit, or a fraudulent diviſion. For ſometimes the Party Accounting, knowing that all theſe leſſer Sums, are wont to be allowed upon his ſole Oath, is wont to divide the greater Sums into leſſer, and particular Sums. And the aforeſaid Oath being taken and admitted, and the Decree of the Judge, intervening likewiſe, it makes full

† *Lind. de teſtamentis. c. ſtatutum. Sect. Inventar vero verb. reddere rationem. Joh. Athon. in gloſ. magna. ad c. libertate de execut. teſtamenti Swinb. parte 6. Sect. 20. n. 1. verb. primo.*

proof as to these lesser Sums, (so as those charges may be avoided, which the Party might otherways be put to, in the proof of payment, by Witnesses,) seeing it is presumed, that no Man will take a false Oath.

2. If in these cases about giving Accounts, any one having Interest to call an Executor or an Administrator to an Account, (to wit the Son of the Deceased, a Legatory, a Creditor, and others, as afterward) do call the Executor or Administrator to exhibit a true, a full, and a perfect Inventory of those Goods of the Deceased, which have come to his hands, and to give a true Account upon his Administration of the said Goods, he ought to exhibit the said Inventory, and make the said Account personally; and (if the Adverse Party request it of him) he ought to take his Oath of the truth of the same, notwithstanding that perhaps an Inventory was already exhibited, at the instance of the mere Office of the Judge, and in the absence of the Party, and that an Account were given by vertue of the Oath of the Party or his Proctor. And observe, that this Inventory is not to be exhibited under the Protestation of adding to the same (as is usual in Inventaries that are exhibited by the Proctors in common form, and not at the instance of a Party) but simply and directly, for a full, a true, and a perfect Inventory of all and singular the Goods of the Deceased, which have come to the hands of the said Party Accounting, since the Death of the Deceased. Therefore let the Parties Exhibiting these Inventories, and making these Accounts, take heed how they exhibit any Inventories which are false or untrue; and how they give an Account upon their Oaths. For if the matter is made otherways manifest and apparent, they not only commit Perjury, but may be proceeded against, by the Ecclesiastical Judge, in a Cause of Perjury: And the Judge may punish them according to the Canons of the Church, if they are convict of any omission of the Goods, or not explaining any of the Sums, mentioned in the Account. And although it is said afterwards, that it is lawful for the Adverse Party, to reprove or object against this Inventory and Account, yet it may be enquired, whether or no, the Adverse Party, who desires this Exhibition

bition of the Inventory and Account, and the Oath of the Party Accounting, upon the truth of the ſame, may afterward (*viz.*) when the Party Accounting, doth take the Oath, upon the truth thereof (at his Petition) be admitted to object againſt this Inventory and Account: Becauſe it ſhould ſeem that this Objection ought to be propounded, before the aforeſaid Oath is taken by the Party Accounting. For *quære*, whether or no, this Oath be a deciding the Sute, or it is a neceſſary Oath, as in other Cauſes, where the Plaintiff produceth the Defendant, upon the Poſitions of the Libel.

3. And although it was even now ſaid, that the Executor or Adminiſtrator being cited, to give an Account, or to exhibit an Inventory, whether *ex officio*, or at the inſtance of a Party, ought perſonally to appear, and do all the premiſes above ſpecified: Yet if in caſe, by the Original Citatory Mandate, it doth not appear that the Party at whoſe inſtance he is Cited, hath Intereſt to Inſtitute this Cauſe, the Defendant may appear by his Proctor, to the effect and form following. When the Proctor of the Plaintiff (having exhibited the aforeſaid Citatory Mandate) hath accuſed the Contempt of the Defendant, who was cited to appear perſonally, to give an Account, or exhibit an Inventory; the Proctor of the Defendant may appear, and exhibit his Proxy in writing, for the aforeſaid Defendant, and make his part for the ſame: And alledge that his Client is not obliged, nor compelled by Law, to exhibit an Inventary, and to give an Account, nor to ſatisfie the contents of the aforeſaid Mandate, brought into Court at the inſtance of *N.* the Plaintiff, in as much as the ſaid *N.* has no Intereſt in this Cauſe; at leaſt, in as much as it doth not appear that he has Intereſt in the Cauſe. If the Plaintiff doth alledge his Intereſt to be ſuch as is approved by Law in theſe caſes, and doth prove the ſame, either by the anſwers of the Proctor or the Party, or by Witneſſes, the Defendant is not only obliged to ſatisfie the contents of the ſaid Mandate, but is alſo to be condemned in charges, which the Plaintiff has been at, in the Proof of this his Intereſt: And if on the contrary, the Plaintiff makes default in the proof of his Intereſt,

the Defendant is to be diſmiſt with charges. But admit that the Intereſt of the Plaintiff is ſuch, whereof the Defendant had no knowledge, at leaſt, a probable knowledge (to wit, becauſe the Plaintiff doth pretend himſelf a Creditor) until the ſame be proved; or if the Defendant, (ſo ſoon as he has proved this Intereſt,) doth not propound any contrary or exceptive matter, againſt the Witneſſes of the Plaintiff, or to fruſtrate his intention, as to this Intereſt; then the Defendant (ſeeing he had juſt cauſe of queſtioning ſuch his Intereſt) is excuſed from charges. But it is otherwiſe, if he propounds and makes default in proof of what he propounds. Yet the Proctors of the Plaintiff, are to be admoniſhed in theſe caſes of exhibiting Inventaries, and giving Accounts; that (if in manner aforeſaid, the Intereſt of their Clients, are denyed, ſo as the Plaintiffs are compelled to prove the ſame) they take care, to get the Certificate of the Citation (which was taken forth, to call the Party to an Inventory and an Account) continued from one Court day unto another, until the Intereſt of the Plaintiff be proved; which being proved, they may cauſe the Defendant to be Excommunicate, if he doth not ſatisfie the Contents of the ſaid Mandate. For the Executor or Adminiſtrator being called to exhibit an Inventory, and give an Account, ought to give the ſame perſonally upon his Oath. Therefore if the Certificate of the ſaid Citation is diſcontinued, the Defendant cannot be Excommunicate, though he doth not ſatisfie the Contents of the ſaid Mandate.

4. If a Legatary doth requeſt an Executor to pay him his Legacy, left him by the Will; and the Executor (pretending that he has not Goods in his hands, which are ſufficient to pay this Legacy,) doth refuſe to pay the ſame: This Legatary may call the Executor to exhibit an Inventory, and give an Account; that ſo by inſpecting the ſame, the Legatary may be ſatisfied of the ſufficiency, or inſufficiency of the Goods of the Teſtator, to pay this Legacy. The Legatary alſo may compel this Executor, to prove and juſtifie this Account by Witneſſes. And obſerve, that in this caſe, the Party deſiring an Account, is not to be condemned in charges, if (the Account being exhibited, and

and inſpected) he doth renounce the Sute, or doth not contend further, nor doth compel the Party Accounting, to prove and juſtifie his Account by Witneſſes. But if this Party who deſireth an Account, doth compel the Party Accounting to juſtifie his Account by Witneſſes, (and Publication being made of thoſe Witneſſes produced upon the Account) the ſaid Party doth give Objections againſt this Account, and faileth in the Proof of them, he is to be condemned in charges, made by the Party Accounting. Alſo the Legatary, to whom the reſidue of the Goods is left, or any part of the reſidue, (that ſo it may appear to him, which and what Portion of the Goods is due to him) hath particular Intereſt, to call the Executor to give an Account. The like Intereſt alſo, hath he to whom the Deceaſed was Indebted, that he may know, whether or no the Deceaſed had Goods ſufficient to pay this Debt: And if the Defendant in this caſe, doth deny the Plaintiffs Intereſt, and doth alledge, that he is not bound to ſatisfie the Contents of the ſaid Citation, until this his Intereſt doth appear as above, then the Plaintiff ought to alledge and prove this his Intereſt, before the Defendant can be compelled, to ſatisfie the Contents of the ſaid Mandate.

5. If the Party who is called to give an Account, or an Inventory, doth deny the Intereſt of a Creditor, it muſt be Alledged and Propounded on this manner following. (*Scil.*) *N.* the Plaintiff or his Proctor, muſt Alledge (*ad omnem juris effectum*) that the Deceaſed (at the time of his Death, and whilſt he Lived) was Indebted to the aforeſaid *N.* in ſuch a Sum: If this Allegation is denyed by the Defendant, then it is to be Propounded joyntly and ſeverally, and right and juſtice, and the Admittance of this Allegation, is inſtantly to be requeſted; which Allegation being admitted, in ſupply of the Proof, of the Contents of the ſaid Allegation, the Bond or Letters Obligatory taken for the ſaid Debt, are to be Exhibited (adding theſe words) that the matters contained in the ſame, are true, and were had and done, as is contained in the ſame. Then this Allegation is to be admitted, and (if when theſe Letters are thus Exhibited) the Defendant doth deny, that they are true, the Witneſſes are to be produced, to

prove the Sealing and Delivery of this Bond; or if the Debts alledged are due by Merchants Books, or other Tradeſmens Books, then the Book where that Debt alledged, is ſet down, ought to be Exhibited, and the Party Exhibiting the ſame, ought to alledge and prove, that this is the ſame Book, in which the Merchant, (or he whoſe Book it was,) was wont to write down the Name of Perſons who were Indebted to him: And this Proof is ſufficient to prove the Intereſt alledged. But admit this Intereſt of the Plaintiff, cannot be proved, neither by Letters Obligatory, nor by a Merchants Book, yet the Plaintiff may be admitted, to prove his Debt by Witneſſes. And it is to be noted, that in this caſe of proving the Intereſt of the Plaintiff (in order to ask an Inventory, and an Account) it is not requiſite there ſhould be ſuch exact and full Proof, as in other Cauſes, wherein it is principally ſued, in order to obtain the whole Cauſe inſtituted, (to wit) Tithes or a Legacy, for in theſe caſes of proving the Intereſt of the Plaintiff, it is not ſued principally for the Debt Alledged, but the Premiſes are Alledged incidently, only to prove, that the Plaintiff hath Intereſt, to call to an account. Therefore it is little inconvenience (nay it is rather an advantage) to the Executors, to make an Inventory and give an account, as is ſpoken afterwards. But without all diſpute, thoſe Perſons to whom the Deceaſed was Indebted, may be very much relieved in this caſe, becauſe by inſpecting the Account, and the Proofs upon the ſame, it may appear evidently, whether the Executor or Adminiſtrator have fully Adminiſtred the Goods or not, which if they have fully Adminiſtred, it is to no purpoſe to commence Sute for theſe Debts. So alſo Legataries do often forbear to Sue for their Legacies, when they find by the Account, that the Executors have fully Adminiſtred the Goods, in payment of the Debts of the Deceaſed.

6. To the aforeſaid perſons, who are ſaid to come in for their Intereſt, (to call Executors, *&c.* to account) may be added others. (*Scil.*) If any Legacy is left to a Minor, the Father, or next of Kindred to the Minor, by the name of Curator (being ſo appointed by the Judg,) to the uſe and behoof of the ſaid Minor, may compel the Executor

Executor to Exhibit an Inventory, and give an account. Likewiſe the next of Kindred to the Deceaſed, (at leaſt if they be poor) may call the Adminiſtrator (of any one, who dyes inteſtate) to Exhibit an Inventory, and give an account: That ſo ſoon as it appears to the Judg, what remains of the Goods, (the Debts being paid) there may be a diſtribution made, of ſome part of the ſame, amongſt the next of kin to the Deceaſed, at the pleaſure of the Judg. Alſo if the Deceaſed in his laſt Will, hath not bequeathed the reſidue of his Goods to any body, nor hath any way diſpoſed of the ſame, (although the Deceaſed has appointed Executors of that Will, and hath given the Executors, by reaſon of their care about the ſame, ſome particular Legacy.) For in this caſe, theſe Executors are † ſaid to be nude Executors, or Supervifors as it were; and the Judge may (as well of his own mere office, as at the inſtance of the poor Relations) call this Executor to give an account, and compel him to make a Diſtribution of the reſidue, to pious uſes, or amongſt the next of Kindred to the Deceaſed. And this has been anciently practiced.

† *Concluditur ex his verbis quod executor tenetur de jure reddere rationem, utrum ab ordinario vel a parte requiritur. Swinb. par. 6. Sect. 20. n. 5. dicitur quod creditores & Legatarii ſint vocandi, utrum judicis vel computantis officium reſpicimus. Computumne quaſ facturum habentia perſonarum earundem non præjudicet eaſd. ſpeculator de Inſtr. edition. Sect. nunc vero aliqua. n. 45. Lind. de teſt. c. ſtatutum. Sect. & poſt quam verb. orainarios.*

7. In every Citation † for an Account, or to Exhibit an Inventory, the Executor or Adminiſtrator, is wont to be called to appear perſonally, to give and Exhibit an Account, yea though he be called at the inſtance of a Party; therefore he is obliged to appear perſonally; at leaſt it hath been ſo practiſed and obſerved, in the Prerogative Court, time out of mind: Yet a Proctor may appear for the Party Cited, to Alledge the Cauſes of the abſence of the ſaid Party, and the Cauſes why he is not obliged to give an account as above, at the third number; and he may Alledge his Infirmity, his Age, or the like cauſes, and that therefore he is not obliged to appear perſonally. But as was ſaid before, if theſe Cauſes are not Alledged and Proved, the Parties called are obliged to appear in perſon. The reaſon is, becauſe that in theſe Cauſes, or caſes of giving accounts, the Oath of the Party Accounting is required upon the truth of the ſame.

8. Now although the Executors and Adminiſtrators of

the Deceaſed, have laid out all the perſonal Eſtate, which the Deceaſed left, (at the time of his Death) in paying the Debts, the Funerals, and other neceſſary charges, ſo as there remain no Goods in their hands, Unadminiſtred: Yet the next of Kindred to the Deceaſed, as alſo the Legataries, and all other perſons, to whom the Deceaſed was Indebted, may ſeverally, or in ſeveral Cauſes, compel theſe Executors and Adminiſtrators to give an account, by means whereof they may put them to infinite Charge. Therefore theſe Executors or Adminiſtrators, ſo ſoon as they are called by any of the aforeſaid perſons, to give an account, (to avoid theſe charges and vexations) they may call one or other, of the nigheſt of Kindred to the Deceaſed in ſpecial, and all others whoſoever in general, (who have or pretend to have any Right or Intereſt to the Goods of the Deceaſed,) to appear in ſuch a day and place, (if they think themſelves any way concerned) to ſee a true and perfect Inventory, of the Goods of the ſaid Deceaſed Exhibited, and account made upon his full Adminiſtration of the ſaid Goods; and alſo to ſee Witneſſes, Produced, Admitted and Sworn in due form of Law, (upon the ſame) and their ſayings and depoſitions publiſhed; and to proceed further in the ſame concern, (according as the Law, and the Nature of the Cauſe requires) even until the Definitive Sentence be Pronounced incluſively, with an Intimation, as above. And it muſt be proceeded in this caſe, in the preſence of the Parties appearing, if any do appear, and in penalty of the contempt, of thoſe who appear not; and all things are to be done, in like manner as is ſpoke of the manner of beginning, proſecuting, and ending Sute. And obſerve, that this method of proceeding is very neceſſary and uſeful, to the Executors and Adminiſtrators, not only (as is ſaid before) to prevent diverſe and manifold Actions, which might be commenced againſt them for Accounts, *&c.* but alſo leſt theſe Executors and Adminiſtrators, ſhould be called to render and juſtifie an Account, when their Witneſſes (who ſhould prove and depoſe the payment of the Debts) are dead: Which Mr. *Clarke* ſays, he has often ſeen practiſed. Likewiſe if this Executor or Adminiſtrator, do

prove

prove their Account, and do obtain the Sentence of the Judge, that they have wholly, and fully Adminiſtred the Goods of the Deceaſed, and that there remain no Goods in their hands, which are Unadminiſtred, their Executors and Adminiſtrators when they dye, are freed from giving an account of the Goods of the firſt Deceaſed. For it is to be noted, that theſe ſecond Executors or Adminiſtrators, may be compelled to make an Account, in the Goods of the firſt Deceaſed, if his Executors or Adminiſtrators have not already made an Account, nor juſtified the ſame. And in this caſe, theſe ſecond Executors or Adminiſtrators, are not allowed to Swear as to the payment of thoſe leſſer Sums, as was ſpoke in the firſt number. For an Oath upon thoſe leſſer Sums, is not to be Adminiſtred to any, but to the Party, who disburſed them: And therefore the ſaid Oath, is not to be granted to the ſecond Executors or Adminiſtrators, but only to the firſt. Alſo the Proofs made, upon an Account, (given at the inſtance of ſome one Party, who hath Intereſt) make no full Proof againſt another, or a third perſon who hath Intereſt, at leaſt if he were not called as above in ſpecial, or in general. Becauſe things done amongſt ſuch perſons, hurt not thoſe who are † abſent. And although it is ſaid above, that the Executors or Adminiſtrators may call all and ſingular, *&c.* as well in ſpecial as in general, to ſee an Account given, *&c.* And that theſe Executors and Adminiſtrators, are freed from further giving Account, at the inſtance of any other perſons; yet this holds not where there are Minors who have Intereſt; becauſe they (when they come to full Age, are permitted to call theſe Executors or Adminiſtrators, to give an Account, notwithſtanding the Premiſes; becauſe theſe things thus done, do not any way prejudice the Minor.

† *Vide notata in marg. ad n. precedens.*

9. If the Party accounting doth deſire Debts to be allowed him in his Account, it is requiſite that he prove two things; Firſt the truth of the Debt. That is, that the Deceaſed in his Life time, and at the time of his Death, was Indebted to thoſe perſons mentioned in his Account. Secondly, that the ſaid Party Accounting hath fully and faithfully paid this Debt. Likewiſe, if in the ſaid Account,

there

there is required an allowance of any charges of ſute, expended in any Secular Court, for the recovery of the Deceaſeds Debts, or in Actions commenced againſt the Party Accounting, for any Debts, ſuppoſed to be owing by the Deceaſed: Or for any charges expended in an Eccleſiaſtical Court, in proving the Will in Common form, or in Solemn form of Law, by Witneſſes, or in Actions for Legacies, when there are not Goods ſufficient in the Executors hands, to pay the ſame: Or in a Cauſe of Temerary Adminiſtration, againſt ſuch as do Temerarily Adminiſter the Deceaſeds Goods, and hinder the Executor, ſo as he cannot Adminiſter the ſame. The Party Accounting in theſe caſes, ought to alledge and prove ſuch Actions to be commenced, and then ſpecifie particularly, and prove by Witneſſes, or by his own Oath, (if the Sums requeſted to be allowed, are leſſer Sums, not exceeding forty Shillings) what charges he hath expended therein. And although it may be here Objected, that the Executor Inſtituted a juſt Cauſe in the Secular or the Eccleſiaſtical Courts, that (ſeeing he got the victory in thoſe ſutes, and alſo his charges of ſute) he ought not to have thoſe charges placed in his Account allowed him. To this it may be replyed, that oftentimes in theſe caſes, the Parties in ſute, although they do obtain a victory in the Cauſe, yet they have not their full, (nay ſcarce half) their charges and disburſments allowed them. Therefore in theſe caſes, an honeſt and juſt Accountant, ought to ſpecifie the whole charges of ſute in his Account, and then he ought to confeſs what Sum was allowed him, in the ſaid Actions; and then deſire an allowance, for the reſidue of the charges. But it is to be noted, that in certain caſes above ſpecified, (to wit) if the Executor ſhall be called to prove a Will by Witneſſes, or to give an Account, and the Plaintiff in theſe caſes, (Witneſſes being produced upon the Will, and the Account being Exhibited) doth renounce the ſute, or doth not further contend, the Executor ſhall not obtain full charges: Therefore in the caſe even now mentioned, theſe charges are to be allowed to the Accountant. And although it is ſaid before, that the Party Accounting, ought to prove, not only the Debt, but alſo the Payment of the ſame; yet many

of

of our late Advocates are of opinion, that to prove the truth of the Debt, it is ſufficient to exhibit the Letters Obligatory, and the depoſition of one Witneſs, upon the Sealing and Delivery of the ſame: And alſo to prove the payment of the ſame, the Depoſition or Oath of one credible Witneſs is ſufficient, (*viz.*) that ſuch a Debt, as is mentioned in the Inventary is true, and that the ſaid Witneſſes received the ſame, and then the Suppletory Oath of the Party in ſupply of the Proof. But as to the payment of Legacies mentioned in the Account, the Accountant ought to prove, that ſuch Legacies as he requeſts, may be allowed, were left in the Deceaſeds Will: And the payment thereof, he may prove by two Witneſſes, or one at the leaſt (*Scil.*) the Legatary himſelf, and the Suppletory Oath of the principal Party. But to prove that there were ſuch Legacies left, if the Accountant do exhibit the Probate of the Will, Sealed with the Seal of the Judge, who proved the ſame; And if the Proctor of the Plaintiff, or the Plaintiff himſelf, do confeſs that that Will was proved, or that the Seal was put to that Probate by the Judge, who is named therein, this is accounted and admitted as full and ſufficient Proof, and the Accountant in this caſe, is not obliged to prove (the Legacies left) by Witneſſes.

10. In the Account, the Executor or Adminiſtrator, ought firſt to charge themſelves with the true value of the Goods of the Deceaſed, ſpecified in the Inventary (for in the Inventaries, the Executors are wont to inſert, all the Rights, Credits, Goods and Cattle of the Deceaſed) then they ought to alledge and deſire Allowances and Deductions to be made on this manner, (*viz.*) Firſt, the Debts which the Deceaſed owed, are to be inſerted, and if they are paid, this Accountant ought ſo to alledge. But if all the Debts are not paid, then he ought only to inſert ſuch as are paid, and then the Funeral charges, and all other ordinary charges whatſoever; and alſo thoſe charges which the Accountant hath neceſſarily expended, and is like to expend about proving the Deceaſeds Will, either in common or ſolemn form of Law, or about ſuch Actions as were commenced, either by or againſt the Executor, by reaſon of his Executorſhip, (to wit) for the re-

recovery of Debts or Goods of the Deceaſed. And at the end of this Account, muſt be ſet down the total Sum of the diſburſements, or things to be allowed. That ſo it may appear (thoſe things being allowed and deducted, which ought by Law to be allowed and deducted) which and what Sum remains in the Accountants hands unadminiſtred.

11. If there doth not remain Goods ſufficient (in the Executors hands) to pay the Legacies mentioned in the Libel; then the Executor or Adminiſtrator (before the Cauſe is concluded) muſt alledge as follows. 'N. (to wit, the Accountant or his Proctor) to all affects in the Law, doth alledge that before this Cauſe was begun, his Client had fully adminiſtred, all and ſingular the Goods of the Deceaſed, and that at preſent there remains not, neither did (at the time of inſtituting this Cauſe) remain any Goods of the Deceaſed, in the hands of his Client, which were ſufficient to pay the Legacy Libelled, and ſued for. This Allegation is to be propounded jointly and ſeverally, and Right and Juſtice is to be deſired: Which being admitted, a Term Probatory is to be given. And ſeeing this Allegation is ſo incertain and general, ſo as the Examiner cannot examin Witneſſes upon the ſame, at leaſt ſo as to make a concluſive Proof of the intention of the Party Propounding; therefore the Party Propounding this Allegation, ought to ſpecifie and declare the ſaid general Allegation, (within the term given for the Proof of it) on this manner. 'N. in order to ſpecifie the Allegation of full Adminiſtration, already given in by him, and with an intention to declare the ſame, doth exhibit a true, full and perfect Account upon his ſaid Adminiſtration, in the Goods of the Deceaſed. and (*ad omnem juris effectum,*) doth alledge, that all and ſingular the matters and things contained in this Account, are true, *&c.* in manner and form as is ſpecified in the ſaid Account: And this Allegation is alſo to be propounded joyntly and ſeverally, and is to be admitted as above, Which being ſo admitted, the Party alledging, may eaſily, and without much charges (at leaſt as to the Examination of the Witneſſes) produce his Witneſſes, not upon the whole Account, but upon that par-

particular Sum or Debt, which the Witneſſes can depoſe to.

12. At the tenth number, it was ſaid, that the Executor or Adminiſtrator, ought in his Account to charge himſelf with the true value of the Goods of the Deceaſed, mentioned in the Inventory already by him exhibited before the Judge (who proved the Will wherein the Legacy ſued for, is given) Yet in a Court of controverſie, the Defendant (to diſcharge himſelf, that is, to prove that he hath fully adminiſtred the Goods of the Deceaſed) though he may have exhibited an Account, drawn in manner and form above ſpecified, yet is he bound to juſtifie or prove, what he hath charged himſelf with, in the ſaid Account, (*viz.*) that ſuch Goods, and no more came to his hands. Therefore he may exhibit a true Copy of the Inventory of the Deceaſeds Goods, (already exhibited by him, before the Judge, at the time of proving the Will) alledging as follows. 'N. in ſupply of the Proof, by him given in this 'Cauſe, hath exhibited a true Copy of the Inventory of the 'Deceaſeds Goods, and hath alledged that this Copy was 'and is ſubſcribed, with the proper Hand writing of O. the 'Regiſter of the ſaid Judge; and that the ſaid Regiſter was, 'and is an honeſt and lawful Notary publick, and that he 'is Regiſter and Keeper of the Regiſtry of the ſaid Judge, 'and as ſuch, is commonly accounted, reputed and taken: 'And that this Copy is faithfully extracted out of the afore-'ſaid Regiſtry, and doth agree with the original Inventory, 'remaining in the ſaid Regiſtry; which ſaid original Inven-'tory, was exhibited in due time, before the ſaid Judge. And this ſame Allegation is to be propounded, joyntly and ſeverally, and is to be admitted as above. And ſeeing the Proctor of the Adverſe Party, is better inſtructed, what and how to anſwer than his Client: Therefore the Proctor Alledging and Exhibiting, ought to ſwear, that he hath faithfully propounded this Allegation, and may deſire, that an anſwer may be given in Writing, (by the Proctor of the Adverſe Party) to this Allegation and Inventory, upon the Oath of the ſaid Proctor; which Oath, the ſaid Proctor ought to take, as is requeſted. If the Proctor of the Adverſe Party, doth confeſs or believe, that theſe Exhibits

hibits were ſubſcribed by the Regiſter, and that the ſaid Regiſter is an honeſt and lawful Notary publick, although perhaps he denies or doth not believe the other things contained in the ſaid Allegation; yet the intention of the Party Propounding the aforeſaid Allegation, is ſufficiently founded. For the other Contents are preſumed to be true, in reſpect of the credit, which ought to be given to the ſaid Regiſter. But if the ſaid Proctor being ſworn to make a faithful anſwer, doth deny that Allegation and Inventory aforeſaid, or doth upon his Oath, anſwer, that he doth not believe the ſaid Copy exhibited, to be ſubſcribed by the Regiſter alledged, then this Subſcription, and the truth of this Allegation muſt be proved, either by ſearching the Records of the ſaid Regiſtry, or by Witneſſes who were preſent at the time of Subſcribing the ſaid Copy of the Inventory, and the Act upon the Exhibition of the ſame, and the collation or comparing of the ſame, (made by the Regiſter,) with the Originals remaining in the Regiſtry. For it is to be noted, that if the Accomptant doth not prove by the Exhibition of the Inventory aforeſaid, what and which Goods of the Deceaſed, came to his hands (by reaſon of the Execution of the aforeſaid Will,) he ought to prove by Witneſſes, which, what, and how many Goods of the Deceaſed came to his hands; which thing is very hard to do. And in as much as he entred to the Deceaſeds Eſtate, immediately upon proving the Will, or adminiſtring the Goods, it is preſumed that there came Goods of the Deceaſed, (to the hands of the Executor) which were ſufficient; or at leaſt, it is preſumed that he may make appear, what Goods came to his hands: Which preſumption is taken away, if an Inventory were exhibited as above. And if it appear by inſpecting the Inventory, that the Goods are not ſufficient, to pay all the Legacies, (thoſe things being allowed and deducted, which are by Law to be allowed and deducted,) it lies upon the Plaintiff, to prove that more or other Goods came to the hands of the Executor.

13. Although the Accomptant is freed from proving the quantity and value of the Goods of the Deceaſed, by the ſole Exhibition of the Inventory, in manner aforeſaid; yet the

the Adverſary in a Cauſe of Legacy, or in any other Cauſe (where the benefit of *Plenè adminiſtravit* is alledged, may object againſt this Inventory and Account, (*viz.*) That there are ſeveral Goods, omitted out of the Inventory; and that there are ſome other Goods, which are not apprized and valued according to their real value and price. And in theſe Objections, the Goods omitted are to be ſpecified, and the true value, not only of thoſe Goods which are omitted, but alſo of any other Goods which are not prized according to their worth.

14. Though Goods are not apprized, nor Inventories made of thoſe Appriſements, according to the Eccleſiaſtical Laws, nor according to the form of the Statute of this Kingdom; yet it hath been obſerved by the ſtyle of theſe Courts (time out of mind) that if the Goods of the Deceaſed were apprized by ſome honeſt perſons, (who are Neighbours of the Deceaſed) and are put into an Inventory, and afterward the ſaid Inventory is exhibited in due time, upon the Oath of the principal Party, in due time before the Judge who proves the Will, or grants the Adminiſtration) that then it makes full Proof, in all Cauſes, and Courts, and the Party Exhibiting the ſame, is freed from proving the truth of the ſaid Inventory, (to wit, that the Deceaſed had more Goods) and it lyes upon the Legatary, or any other perſon, who pretends a right to the Deceaſeds Goods, to prove what Goods are omitted.

15. Upon what grounds or conſideration Mr. *Clarke* inſerts this here, I well know not; however, leſt I ſhould alter Mr. *Clark's* intention, in placing it any where elſe, I ſhall inſert it, as it offers it ſelf, here amongſt theſe Accounts. If an Executor is called, (either of the Office of the Judge, or at the inſtance of a Party) to prove any Will, which is already proved before a Judge, (in remote parts) in common form of Law; or is called to accept or refuſe the Execution of the Will, and this Executor doth defer to prove this Will in common form of Law. Or if any one who is next of Kindred to the Deceaſed, or if the Relict of the Deceaſed, (to whom the Adminiſtration of the Deceaſeds Goods might appertain if he dyed inteſtate) are called to accept or refuſe the Adminiſtration of the Goods

Goods of the Deceaſed, or to ſhew cauſe why Adminiſtration of the Goods of the ſaid Deceaſed, may not be granted to ſuch an one (*Scil.* to ſome of a more remote degree, or to ſome Creditor.) Or if ſome Will is proved before a Judge in remote parts, in ſuch caſe, where the Deceaſed (as the Plaintiff pretends) had Goods ſufficient (out of the Dioceſs where he dyed) at the time of his Death, to found the Juriſdiction of the Prerogative Court of *Canterbury*, and the Executor is called to ſhew cauſe, why the Probation of this Will, (being made before one who was no proper Judge,) may not be revoked and declared as null, and invalid. Likewiſe if an Adminiſtration of the Goods of any one Inteſtate, is granted before an Incompetent Judge in remote parts, (whereas the ſame ought to have been granted by the Judge of the Prerogative Court, as the Plaintiff pretends at leaſt.) And this Adminiſtrator is called to ſhew cauſe, why the ſaid Adminiſtration may not be revoked and retracted, as being granted by an Incompetent Judge: Or if he who obtains Letters of Adminiſtration (from the Judge of the Prerogative Court) of any one Deceaſed, doth call another perſon, (who hath alſo obtained Adminiſtration of the ſaid Deceaſeds Goods to be granted him by an inferior Judge) to anſwer certain Articles, touching a Temerary Adminiſtration of the Goods of the Deceaſed, and in the like caſes, whereof the Judge of the Prerogative Court takes cognizance: In all theſe caſes, if the Deceaſed (notwithſtanding what the Plaintiff may pretend) hath not ſufficient Goods to found the Juriſdiction of the Prerogative Court, a Proctor may appear for the Party Cited, under Proteſtation of not conſenting to the Judge of the Prerogative Court, as a Competent Judge in this Cauſe, on his part, and may alledge as follows, (*viz.*) that *N.* the Party Cited, is not bound to appear, nor to ſatisfie the Mandate, brought in againſt him, in as much as the cognizance of this Cauſe, doth not appertain to this Court, ſeeing the Deceaſed dyed in ſuch a Pariſh of the Dioceſe of *N.* and that he had not in his Life time, nor at his Death, Goods ſufficient (or none at all) out of that Dioceſs, to found the Juriſdiction of this Court; and then the Plaintiff ought

to

to alledge, and prove, as in the following number. For it is not preſumed, that the Deceaſed had Goods out of that Dioceſe where he dyed, and by the Common Law, every Will ought to be proved, and every Adminiſtration ought to be granted before the Ordinary of the place; the Defendant therefore in this caſe, hath the preſumption of the Law on his ſide: In this caſe therefore, it lies on the part of the Plaintiff to prove the Juriſdiction of the Prerogative Court. And obſerve, that although it is ſaid, the Defendant may alledge that the Defendant had not, at the time of his Death, Goods ſufficient out of the Dioceſe, to found the Juriſdiction of the Prerogative Court, *&c.* Yet it may not be doubted, but that the Party who propounds this Allegation, ought to prove the ſame. Mr. *Clarke* believes it not ſafe, (to avoid the queſtions in Law about this matter) that the Defendant appearing in any of the aforeſaid caſes, under thoſe Proteſtations, do only ſay, that he is not bound to ſatisfie the Contents of the ſaid Mandate, ſo introduced, unleſs the Juriſdiction of this Court and of its Judge, do appear.

16. And if in any of the aforeſaid caſes, the Juriſdiction of the Prerogative Court is denyed, and declined, then the Proctor of the Plaintiff ought to alledge and prove, that the Deceaſed died, in ſuch a Dioceſe, or peculiar Juriſdiction, and that at the time of his Death, he had ſuch and ſuch Goods and Chattels out of that Dioceſe, amounting to ſuch a ſum, in ſuch a Pariſh; and that that Pariſh is within ſuch a Dioceſe, (*viz.* in another Dioceſe, or Juriſdiction, out of that Dioceſe where the Deceaſed died, and if the Defendant denies this, and the Plaintiff proves it, the Defendant is not only to be condemned in Charges which are made, and to be made about the proving the Juriſdiction, but alſo (in preſence of his Proctor,) the Adverſe Party may deſire, and the Judge may decree, according to the Contents of the aforeſaid Mandate brought into Court, that the Defendant ought to ſatisfie that, which otherwiſe ought to have been done, if the objection had not been proved againſt the Juriſdiction of the Court. Yet it is to be noted, that it is expedient for the Proctor, (who denies the Juriſdiction of the Prerogative Court)

that he propound it *bona fide*, for otherwiſe, the Proctor ſo declining the Juriſdiction of the Prerogative Court, is Guilty of Perjury: Seeing that when he is admitted Proctor in the Arches he Swears that he will never do, nor procure any thing to be done, againſt the Priviledges, and Juriſdiction of Chriſts Church in *Canterbury*.

17. If any who is aged or infirm, or any other priviledged Perſon is called to appear perſonally to give an account; his Lawful Proctor upon that day (againſt which he is cited to appear to give an account) in order to excuſe him from any contempt, may alledge ſome of the aforeſaid cauſes, why he is not bound to appear to give an account perſonally: And if his Adverſary doth not deny theſe Alledgments, a Commiſſion is to be granted to remote parts, in order to Swear the Accomptant, not only upon the whole account, but alſo upon every one of the leſſer ſums, under Forty Shillings, and a certain day and place, is to be appointed for the diſpatch of this Commiſſion, and all things are to be diſpatched and done, in the preſence of the Adverſary or his Proctor, or in Penalty of their contempt as in other Commiſſions of this nature. But if the Adverſe Party doth deny thoſe things alledged by the Defendant, in order to excuſe him from a perſonal appearance, then they are to be alledged and proved; and being proved, the Party denying theſe alledgments, is to be condemned in Charges, and a Commiſſion is to be granted, to the aforeſaid effects. And if on the contrary, the Party alledging the ſame, doth make default in the proof thereof, then the Defendant is not only to be condemned in Charges, but is alſo to be Excommunicate, for not ſatisfying the Contents of the Mandate, brought into Court. Therefore let the Proctor of the Plaintiff, take care in this caſe, that the Certificate of the aforeſaid Mandate, brought in as before, be continued until the next Court day; after the day aſſigned for the proof of thoſe alledgments made by the Defendant; for if the Certificate is diſcontinued, and the Defendant gives not an account, he cannot be Excommunicate. Obſerve alſo that in the Act of Court, at the time of granting the ſaid Commiſſion, the Proctor of the Adverſary is to be admoniſhed to be preſent, at the time of

diſpatching

diſpatching the Commiſſion, if he thinks himſelf intereſſed, and that if neither he nor his Client are ſo preſent, all things are valid, as done in penalty of their contempt. Laſtly, obſerve, that the proceeding upon this Commiſſion, being tranſmitted, and the Party being Sworn as to the Truth of the Account, as well in general, as in ſpecial, upon the particular leſſer ſums; if it do appear to the Judge who grants this Commiſſion, that all things were done in due order, and that the aforeſaid leſſer ſums were not fraudulently, or deceitfully divided; then at the Petition of the Proctor of the ſaid Accomptant, all theſe leſſer ſums are to be allowed, though this is not practiſed in theſe days, (that is, the Commiſſion being tranſmitted, the Petition for an allowance of thoſe leſſer ſums) for the Commiſſioners have not power to allow the Party theſe leſſer ſums, but only to Adminiſter the Accomptant his Oath, upon the ſame: But it is convenient to conſult the Advocates, whether or no it be convenient ſo to practice: (*Scil.*) the proceeding upon the Oath of the Accomptant being tranſmitted back to the Judge, whether or no the Proctor ought to deſire the leſſer ſums to be allowed, or whether or no they are not allowed, by taking the aforeſaid Oath, without the Judge his Decree

## CHAP. IV.

### *Of* LEGACIES. *The whole order of ſuing for and recovering them.*

### SECT. I.

1. *A Legatary may ſue in a Cauſe of Legacy, againſt an Adminiſtrator of the Deceaſeds Goods, though no Will be proved.*
2. *All the Executors are to be called, in a Cauſe of ſubſtraction of a Legacy.*
3. *Of a neceſſary Allegation, to be propounded by the Executor, to avoid his being condemned in the Legacy, if no Goods of the Deceaſeds remain in his hands, beſides Bonds or Bills,* &c.
4. *The benefit of* Plenè Adminiſtravit, *may be pronounced and alledged, after Sentence is pronouced.*
5. *The Petition of the Executor, that the Legatary may give Bond to bear him harmleſs, upon the receipt of his Legacy.*
6. *Of the equal diviſion of the Goods among the Legataries, if the Teſtators Goods are not ſufficient to pay the whole Legacies.*
7. *The manner of offering a Legacy.*
8. *Of a particular, ſpecial, and verbal Oblation or offering of a Legacy.*
9. *The Legatary (although the Executor doth offer the real value of the Legacies, as well before the Sute is begun as alſo in Court) may refuſe this oblation or offer without damage.*
10. *A third Perſon may come in, in this Cauſe.*

Sometimes

SOmetimes the Son, or next of Kindred to the Deceaſed, knowing that the Deceaſed hath given many Legacies by his Will, to avoid the payment of them, by ſuppreſſing the Will, procures an Adminiſtration of the Deceaſeds Goods, as though he died Inteſtate; by vertue whereof, he Adminiſters the Deceaſeds Goods: But the Legatary in this caſe, may ſue the Adminiſtrator in a Cauſe of Legacy, alledging that the Deceaſed made his Will, and appointed the ſaid Adminiſtrator his Executor if it be ſo; if not, then this clauſe is to be omitted: For it is ſufficient to prove that the Teſtator gave ſuch a Legacy; and that the Defendant got an Adminiſtration of the Deceaſeds Goods, granted to him; by vertue whereof, he inveſted himſelf in the Goods of the Deceaſed. Theſe things being proved, though the Will were never exhibited, nor proved before any Judge in common form, yet the Defendant is to be condemned in the Legacy and in Charges, as in other ordinary Cauſes of ſubſtraction of Legacies. Mr. *Clarke* ſays he has known this Cauſe of Legacy, Inſtituted, (Thirty Years ago) againſt the Temerary Adminiſtrator of the Goods of the Deceaſed, and the Plaintiff hath obtained his Cauſe, where he proved that the Legacy was left, and that the Defendant did Adminiſter the Deceaſeds Goods. But conſult the Learned in this caſe, and obſerve that a Temerary Adminiſtrator, is he who on his own Authority intermedles with the Deceaſeds Goods without the Authority of the Judge.

2. If the Teſtator doth appoint many Executors, and they all do prove the Will, and the Legatary doth cite, or ſue only one of them in a Cauſe of Legacy, that Executor, although to Purge his Contumacy, he ought to appear; yet upon the day of his appearance, he may alledge, that the Deceaſed appointed many Executors, and that they all proved the Will, and took upon them the Execution of the ſame, and that they are all of them alive, and that therefore, he is not obliged to anſwer in this Cauſe, nor to undertake the Sute, unleſs all the other Executors be alſo called: But this Allegation is to be propounded, before the Sute be conteſted, otherwiſe it cannot be admitted: Becauſe the Defendant by conteſting the Sute, doth take the

Sute upon him, and doth renounce the benefit of Exception. But admit the Teſtator hath appointed three or more Executors, and that they all do prove the Will, and take upon them the Execution thereof, and two of them die: Yet the Legatory cannot Sue the Executors, or Adminiſtrators of theſe Executors, in a Cauſe of Legacy, but he muſt commence his Sute againſt the Superviving Executor. And if all the Executors do die * before any Sute is commenced, the Legatary ought to Sue the Executors, or Adminiſtrators of the Superviving Executor, or he who was laſt alive. The reaſon of this is, becauſe the Law preſumes, that the Goods of the Deceaſed, not Adminiſtred by the other Executors, muſt remain in the Power of the Superviving Executor; and if they remained not in his cuſtody, and that it doth appear that the Superviving Executor could not commence an Action (before an Eccleſiaſtical Judge) againſt the Executors (of thoſe other Executors, who are dead,) in a Cauſe of Temerary Adminiſtration, *&c.* or if there remains no Goods of the dead Executor, in the hand of his Executor *in ſpecie*, then theſe ſecond Executors are to be called to give an account of the Goods of the firſt Teſtators, which came to the hands of the Deceaſed Executor.

* *Mynſ. Inſt. de Legat. Sect. poſt. mortem. n.* 4.

3. If an Executor (knowing that there are Goods of the Deceaſed, remaining in his cuſtody, which are not ſufficient to pay the Legacy Sued for; yet knowing that there are debts owing to the Deceaſed, which are partly good or recoverable, and partly deſperate) ſo ſoon as an Action is commenced for a Legacy, in order to avoid Sutes and Charges, he may Produce and Exhibit into Court, (thoſe Bonds or Bills † of ſuch debts) in this form. (*Scil.*)

† *Circa quantitatem hæreditar. tempus mortis teſtatoris reſpicitur, niſi in nominibus hæreditar. Mynſ. Inſt. de Logator. Immin. Sect. Quantitas autem per tot. & n.* 3. *verb. patrimoni.*

'I *N.* that is, the principal Party or his Lawful Proctor, with intent to avoid Sute, and Injuſt Vexation, and the future Charges, do really Exhibit certain Letters Obligatory, ſpecifying the Names of the Creditors: And I grant the Plaintiff, or his Proctor, all right of Action, in order to recover the ſaid debts: And I offer my ſelf ready and prepared, to give ſufficient ſecurity, that I have not releaſed, neither will releaſe the ſaid debts: And I offer and deliver to the Plaintiff (if he be preſent, or to his uſe if he be abſent)

'ſent) a Letter of Attorny made and granted in my Name, 'to Sue and recover theſe debts, to the ſole uſe and behoof 'of the ſaid Legatary; and I alſo offer my ſelf ready to give 'Security, that I will not for the future revoke theſe Let-'ters of Attorny. And if the Plaintiff will not accept theſe debts thus offered, but will go on in Sute, and in the end of the Sute, cannot prove any other Goods to be remaining in the hands of the Executor; the Executor is to be abſolved, and diſmiſſed with Charges, which are made, from the day on which the aforeſaid offer was made: And if on the contrary the Legatary doth prove that other Goods (beſides the Bonds offered) remain in the Executors hands, ſufficient to pay the Legacy Sued for, the Executor is to be condemned, not only in the Legacy asked (at leaſt as to the quantity of the Goods, which remain in his cuſtody,) but alſo in Charges of the whole Sute. But obſerve, that if the Bonds or Debts, offered by the Executor are recoverable, then the Executor ought to expreſs and deduct out of the Goods of the Deceaſed (if they amount to ſo much) thoſe Charges of Sute, which may be diſburſed about the recovery of theſe Bonds or Debts, at the Common Law: But if there remains not Goods in the Executors hands, which are ſufficient to bear the Charge of Sute, at the Common Law, in order to the recovery of theſe Debts or Bonds; the Executor is not obliged to Try a Sute at Law about the ſame, at his own proper Charges: Yet at the time of offering the ſaid Bonds or Bills (if they are accepted by the Legatary) it is expedient that the Executor do particularly proteſt, that there remain not Goods in his hands, which are ſufficient to bear the Charge of a Common Law Sute.

4. If the Defendant who is Sued in a Cauſe of Legacy doth not in the whole proceedings, before the Cauſe is concluded) alledge a *Plenè adminiſtravit*, (*viz.*) that there remain not Goods in his hands, which are ſufficient to pay the Legacy Sued for, nor that it doth any way appear to him, that there are remaining in his hands, which are ſufficient, *&c.* he may alledge this after Sentence is pronounced, to hinder the Execution of the ſame. Yet (if the Adverſary require it,) the Party thus alledging is

to be condemned in Charges, of the first instance, for his negligence in not alledging it at the first, and is to be compelled to pay those Charges before he can be heard. Though this fails, if after the Sentence is pronounced, and before the same is put in Execution, the Executor is cast at the Common Law in a Debt which was unknown to him before the Sentence was pronounced: So that by reason of his being so cast, there do not remain Goods in his hands, which are sufficient to pay the Legacy adjudged; in this case, the Executor may alledge this *Plenè administravit*, after Sentence, and if he proves such his alledgment, he is not to be condemned in Charges of the first Sute, nor is he to be compelled to the payment thereof, before he be heard or admonished: Unless the Adverse Party can prove, that this Executor or Accomptant had knowledge of this debt, before Sentence was pronounced. For then he was to blame, in not alledging it, before the Cause was concluded: And therefore it is convenient, that the said Accomptant do alledge in this allegation, that he had notice of this debt, only since the Cause was concluded; and by this he shall avoid the payment of Charges, until the end or event of the proof, of this allegation, or the not proveng it. For if he proves it upon his Oath, he is not to be condemned in Charges, but if he makes default in the proof thereof, he is to be condemned in Charges, as well of the first, as of that instance.

5. If the Testator was in his life time bound for any one for some debt, to become due some years after his Death, or for the performance of any Bargains, or Contracts afterward; though the Executor in this case hath Goods in his hands, which are sufficient for the payment of Legacies; yet if the said sum, for which the Testator was Bound (as above) is not paid; or if the said Contracts are not fulfilled or performed, so that the Creditor may have an Action at the Common Law, against the said Executor, for the aforesaid debt, or for not performing the said Conditions, or Contracts aforesaid: In this case, the Executor for his Security, may offer the Legacy Sued for into Court, under the condition, that the Legatary shall first give good Security to bear the Executor harmless, as to the Debt,

and

and Conditions aforeſaid: * At leaſt for ſuch a part or portion of the Legacy Sued for, and adjudged, having reſpect to, and a juſt computation of the other Legacies. And in this caſe, if the Legatary do deny the premiſſes, (*Scil.*) that there are no ſuch Bonds, *&c.* The Executor ought to Exhibit theſe Aſſignments and Indentures: And if the Legatary doth deny them, he ought to prove the Sealing and Delivery of them by Witneſſes: Which being proved, if the Legatary doth refuſe to give Security, to the effects aforeſaid, the Judge is not wont to compel the Executor to the payment of the Legacy, but the Executor may depoſite the aforeſaid Legacy, into the hands of the Regiſter under the aforeſaid condition. But Mr. *Clarke* ſays, he has known it practiſed in this caſe, that it is ſufficient, that the Executor do only alledge the Debts and Conditions aforeſaid, and Exhibit the Inſtruments drawn thereupon into Court, upon his own Oath, touching the Truth of the ſame; becauſe that in theſe caſes, a full and exact Proof is not required.

* *Lege falcidia cavetur ut pars quarta bonorum penes Executores remaneat. Ratio hujus. innititur à Myn. Inſt. Tit. Legator. immin. n. 7. 13. in text. ſupereſt.*

6. The Debts and Funeral Expences of the Deceaſed, and other Ordinary Charges being paid, † if the Deceaſed has not Goods ſufficient to pay the whole Legacies an equal rate and proportion * is to be made to every Legatary, according to the quantity of his Legacy. Yet two things are here to be noted: Firſt, that if the Deceaſeds Goods are ſufficient to pay all the Legacies that are left in this Will *in ſpecie*, but not all the Legacies that are left in *genere*, then all thoſe Legacies *in ſpecie*, are to be paid, no deduction being made, in reſpect of thoſe Legacies in *genere*. † Secondly, That if the Sute be commenced by one Legatary (to whom perhaps, a conſiderable Legacy is left in general) againſt the Executor, and the Executor is condemned by the Sentence of a competent Judge, to the payment of this Legacy, before the other Legataries, (who have Legacies eft them in general alſo) do commence any Sute, or make requeſt for eir Legacies; if afterward, theſe other general Legataries

† *Myn. Inſt. T. Legat. immi-nutio. Sect. cum autem. n. 1, 2.* * *Myn. ibidem. n. 5.*

† *Genus jure noſtro varias habet acceptiones. Zaſius in ſuis intell. mox. à princ. diſtinguitur in ſummum, ut ſubſtantia; ſubalternum, ut Animal; infimum, ut ſervus, boſ, &c. hoc eſt quod à Dialecticis vocatur ſpecies inferior, & hoc infimum triplici differentia recipitur. Myn. ubi ſupra. de Legat. Sect. ſi generaliter. n. 1, 2, 3, 4, 5. etiam apud. ff. tit. de optione & elect. Legati, ubi reperias differentiam inter legatum in genere, & in ſpecie.*

ries, do commence Sute for their Legacies, and (the ſaid conſiderable general Legacy now ſpake of being paid) there are no other Goods remaining, to pay theſe other Legacies *in genere*, the Executor is not to be compelled to pay theſe other Legacies *in genere*, nor to make the aforeſaid equal diviſion, but ſhall be freed, by the benefit of his *Plenè adminiſtravit*, and the Sentence of the Judge; but *quære.*

7. An oblation or offer may be made of a Legacy in like manner as of Tithes. For example, if the ſum of an Hundred Pound is bequeathed, and the Executor has only the ſum of Ten Pounds of the Deceaſeds Goods remaining in his hands, which he really offers in Court with the Charges: If this offer is refuſed, the Plaintiff (not proving a greater ſum) is to be condemned in Charges, which are made in the Sute, ſince the day of ſuch refuſal, the Defendant is to pay what Charges were before; and ſo on the contrary, if the Plaintiff doth prove a greater ſum.

8. If a Legatary, (to whom Houſhold Goods, Sheep, Oxen, Cows or Horſes or any other Legacy not potible (which are called Cattels) is left) ſuch an Executor, for theſe Legacies *in ſpecie*, and the Executor doth intend to pay theſe Legacies *in ſpecie*, and not to offer the price, or value of them; leſt it ſhould be diſputed betwixt this Legatary and the Executor, touching the real value of theſe Legacies; this offer is to be made on this manner. I *N.* having an intention to avoid Sute, and prevent an injuſt Vexation, and future Charges, do offer my ſelf ready to deliver to the Plaintiff ſuch Legacies, (*viz.*) thoſe for which the Sute is commenced, *&c.*) in the Houſe wherein they remained, at the time of the Teſtators Death: Or (if they are removed thence) in ſome other indifferent place, to be aſſigned by the Judge, upon any day to be appointed alſo at the pleaſure of the Judge: And I offer my ſelf ready, and prepared to pay all ſuch Charges as are due, or to be taxed by the Judge. And whether this offer be accepted or refuſed, you muſt proceed in like manner, as in the offer of Tithes, of which afterward. This only excepted, that in this caſe of Legacy a verbal offer

offer before the Sute is moved is ſufficient, becauſe theſe Legacies cannot be really offered in Court; but in Tithes, the offer is judicial before the Libel.

9. If the Deceaſed doth bequeath to his Son, ſome Houſhold Goods, or ſuch a Horſe or a Gold-Ring, (which has his Fathers Signet upon it) and perhaps which the Deceaſed intends to leave his Son as an Heir-loom, and deſires he may have it *in ſpecie* in this caſe, he may refuſe the value of it, offered by the Executor, and may inſiſt to have the thing *in ſpecie*, (at leaſt if it is in being) and if the Executor doth perſiſt in the Sute he is to be compelled to reſtore the ſame *in ſpecie*, and is to be condemned in Charges, although he have offered the real value of it. And obſerve that in every Sentence to be pronounced in this caſe, the Judge is wont to condemn the Party to pay the Legacies *in ſpecie*, if they are extant, otherways, the true value of them. And ſo alſo he who Sues for Tithes, may if he will, refuſe the ſum offered, and inſiſt for the Tithes *in ſpecie*, and ſo in every Sentence to be pronounced in ſuch a Cauſe, the Judge is wont to condemn the Party (ſubſtracting the Tithes) in the Tithes if they are extant, or otherwiſe in their real value, *&c.*

10. In this Cauſe alſo, a third Perſon may come in for his Intereſt, like as in a Matrimonial Cauſe, where at the Eighteenth number, it is already ſhown.

CHAP.

# CHAP. V.

## *Of TITHES. The whole order of Suing for, and recovering them.*

### SECT. 1.

1. *What and how many fold, Tithes are ſaid to be.*
2. *The order of getting a Monition againſt the Pariſhioners, to pay Tithes, under penalty of ſuſpenſion from entering the Church, and of Excommunication.*
3. *The manner of Executing, and Certifying this Monition.*
4. *The Petition of the Proctor, after the aforeſaid Monition is returned, if the ſaid Pariſhioners, do not pay Tithes, though admoniſhed.*
5. *The manner of proceeding, if the Pariſhioners (being cited) do not appear.*
6. *The manner of proceeding in the aforeſaid caſe, if the ſaid Pariſhioners (being ſo cited) do appear.*
7. *The Cuſtoms (touching the manner and form of Tithing) and the Immunities of the Church, for not paying Tithes, may be alledged before the Eccleſiaſtical Judge.*
8. *The manner of offering a ſum in the name of the Tithes, to avoid Sutes.*
9. *The manner of accepting the offer in full payment, and of condemning the Defendant in Charges.*
10. *The Plaintiff may refuſe a general offer (for Tithes that are due) made before the Libel is given.*
11. *In what caſe the Party offering the Tithes, is not to be condemned in Charges.*
12. *The manner of condemning both the Defendant, (who offers the Tithes after the Libel is given) in Charges, and alſo the Plaintiff refuſing to accept the ſum, in full payment.*
13. *Another ſort of refuſal to accept the offer (in full ſatisfaction of all the Tithes) made before the Libel was given.*

14. *In*

14. *In what caſe it is convenient, for the Defendant to ſpecifie, for what Tithes it is, that he makes the offer.*
15. *If there are particular offers made of the Tithes, the Plaintiff may receive one of them, and Sue for the reſt.*
16. *Of another offer of Tithes, to avoid the Penalty of the Statute.*
17. *The manner of reſtitution, or reſtoring the Plaintiff to his Term Probatory (in a Cauſe of Tithes) if it be elapſed.*
18. *The manner of requeſting the fruits of a Benefice whilſt a Sute is in dependance, touching the Title of the Benefice, or the right of Tithes.*
19. *The manner of putting Sentence in Execution, in a Cauſe of Tithes, as to the Charges, though it be Appealed from the Sentence, and though the Judge be Inhibited.*
20. *In what caſes it is Lawful to Appeal from the Execution of the Sentence, as to the Taxation of the Charges, in Cauſes of Tithes, notwithſtanding the Statute of* Henry *the Eighth.*

THe word *Decimæ*, or Tithes, is variouſly taken in the Law † in ſhort they may be defined a certain part, of all ſuch things as are Lawfully acquired; and is due to the Church by Law, or cuſtom *. Tithes are alſo divided into perſonal [*Scil.* ſuch as any one pays for his Profeſſion, Office, Induſtry, the tenth part of the Profits whereof, was formerly due to the Church] they are alſo Predial or Real, [*Scil.* ſuch as are received out of the thing, Fruits or Profits] and theſe are divided into *major*, or *minor*, greater, and leſſer Tithes. They are alſo divided into *Novales*; that is, ſuch as are received of the Fruit of Lands, never tilled before; of which ſort is the Tithes of Corn growing upon our barren and heath ground †.

2. Firſt a monition is to be requeſted, in the name of a competent Judge, (*viz.*) of the Arches, the Audience, or in the name of the Biſhop, or his Official (but *quære* whether or no this hold as to the Inferior Judges) peremptorily to admoniſh all and ſingular the Pariſhioners, that they pay (or cauſe to be paid) to *N.* the Rector or Vicar of *M.* all their Tithes, under penalty of ſuſpenſion,

† *Johannes Calvin. in Lex. juris. moneta. tract. de decim. c. 2. n. 4.*
* *Henricus Canif. tract. de decim. c. 1. Rebuff. tract. de decim. q. 4.*
† *De hiſce omnibus plenius reperias apud Rebuff. tract. de decimis, queſt. 3. n. 26. Zoeſ. in comment. ad jus canonicum tit. de decimis, c. 1. n. 6. in fin. Beſoldus. theſ. pr. voc. Zehen. S. Lind. de conſuet. c. ſtatutum. verb. Decimarum perſonalium nullus verb. fructus.*

sion, from entring the Church of the major Excommunication to be pronounced against such as do not pay their Tithes, after a Canonical and Lawful Monition. In the old Monitions used in these cases, instead of these words, (to be pronounced, and promulged) they used these words (in penalty of the Sentence of Excommunication, which is *ipso facto* pronounced and promulged.) But *quære* why they are now omitted. * But mention is to be made in this Monition, that *N.* is Rector or Vicar, and that the Parishioners do refuse to pay their Tithes; if all of them refuse to pay their Tithes, then because they cannot all of them conveniently be personally admonished, a Monition is to be granted *viis & modis*, which may be publickly denounced on the Lord's day in time of Divine Service, in the said Parish Church. But if any particular Persons do refuse, seeing they may be easily convened, then a personal or ordinary Monition is to be decreed.

* *L. de decim. c. quia quidam. Sect. præsentis verb. Involvi. videtur ex Canone Sententia potius ferenda quàm lata nisi consuetudo habet tales pro Excommunicatis.*

3. If the aforesaid Monition be general, (as above) and a Monition *viis & modis*, the same is then to be published in the Church. And if the Parishioners, notwithstanding this Monition do refuse to pay their Tithes, it is to be Certified upon what day, and by whom it was published. But if the same is against some particular Persons of the Parish, then the same is to be Executed and Certified, like to an original Citation.

4. This Monition being returned, the Proctor of the Plaintiff must Exhibit his Proxy for *N.* the Plaintiff, and alledge, that his Client is the Rector or Vicar of the Parish Church of *M.* and as such is commonly reputed and taken; and that in right of his Church, he ought to receive all the Tithes and Ecclesiastical Rites whatever, growing and arising within the said Parish: And that notwithstanding the Premisses, such persons (naming those who were Admonished), have refused and do yet unjustly refuse to pay their Tithes. And that they have been by your Authority (speaking to the Judge) Admonished Lawfully and Peremptorily Admonished to pay these Tithes, to the said *N.* the Rector or Vicar, under penalty of Excommunication, to be pronounced against them; (or rather under Penalty of their being declared to have incurred the Sentence

Sentence of Excommunication, already pronounced by Law) as appears by the ſaid Mandate, and the Certificate thereupon: And that notwithſtanding this Monition, they yet expreſsly refuſe to pay their Tithes, to the ſaid Rector; not fearing to incur the penalties pronounced againſt ſuch, as do not pay their Tithes after a Canonical Monition. Wherefore he muſt deſire that they may be cited to appear on ſuch a day, and in ſuch a place, and ſee themſelves Excommunicate, for not paying their Tithes, to the ſaid Rector, and for not obeying the aforeſaid Monition; or rather, to hear and ſee themſelves pronounced and declared to be ſuch, as have incurred the Sentence of Excommunication already pronounced by Law: Which Petition the Judge decrees. In former times, it was wont to be practiced on this manner, in this caſe, (*Scil.*) the Pariſhioners being Admoniſhed to pay their Tithes in manner and form aforeſaid, and yet refuſing to pay them (upon a return of the Monition, a Certificate being made upon it, and the Rector being Sworn, that ſuch of the Pariſhioners were Admoniſhed to pay theſe Tithes, but have not paid them) the Judge was wont to pronounce thoſe Perſons ſo Admoniſhed, to be contumacious, and to have incurred the Sentence of Excommunication pronounced by Law, againſt ſuch as refuſe to pay their Tithes, after a Canonical Monition: Neither was the Citation taken out before this Pronunciation, as was ſaid above. But at this day it is practiſed, as in the following number, (but very rarely) which late practice, whether or no it be more conſentaneous to the Law, than the Ancient, is to be enquired.

5. Now the Citation above ſpoke of, being Authentically Certified: If the Parties cited do not appear; at this day (though they were cited to the particular effect mentioned in the foregoing number, yet) they are to be Excommunicate, in Penalty of their contempt. For not Appealing; and are not to be pronounced to have incurred the Sentence of Excommunication aforeſaid, (but *quære*;) therefore to avoid all diſpute upon this account, it is convenient to inſert an Intimation in the ſaid Citation, (*Scil.*) that if being Admoniſhed, they do not pay their Tithes, nor if (being cited to the effect aforeſaid) they do not appear

appear and alledge ſufficient Cauſes why they do not pay theſe Tithes; the Judge doth intend to pronounce them, to have incurred the ſaid Sentence of Excommunication, and that they are to be denounced as Excommunicate. And then (this Citation with this Intimation, being returned and Authentically Certified, and the Contempt of the Parties thus cited, and intimated, accuſed in Form of Law, and they not appearing nor alledging any Cauſe, as above) they are to be pronounced to have incurred the ſaid Sentence of Excommunication, and are to be denounced as ſuch, and if they perſiſt in that State, they are to be ſignified and kept in Priſon, until they ſatisfie their contempt, not only to the Church, but alſo pay the Rector, as well the Tithes they have detained, as alſo the Charges of Sute, and of their Contempt.

6. Now if the Pariſhioners, (thus cited to ſhew Cauſe, why they may not be pronounced to have incurred the Sentence of Excommunication, for not paying Tithes according to the Monition Executed in that behalf) do appear and alledge, that they are not bound to pay Tithes to the Plaintiff until it doth appear that he hath intereſt to receive thoſe Tithes mentioned in the Monition, and Citation aforeſaid; then the Plaintiff ought to alledge and prove his intereſt. (*Scil.*) If he be Rector, he ought to alledge that he was Canonically Admitted, Inſtituted and Inducted, (ſo many years ago) to the ſaid Church, and that he is in peaceable poſſeſſion of the ſame, and ſerves the Cure of Souls there, as well in the Adminiſtration of the Sacraments, as in Celebrating the Divine Service; and that he doth perſonally reſide there, and is commonly accounted, reputed and taken for and as, the Lawful Rector, and Canonical Poſſeſſor of the ſaid Church. If the Pariſhioners who are Defendants do confeſs theſe Alledgments, the intereſt of the Rector is ſufficiently founded; for then it neceſſarily follows that all the Tithes of the ſaid Pariſh are preſumed in Law, to belong to him: But if they deny the matters thus alledged by the Plaintiff, they are eaſily proved by Exhibiting the Letters of Inſtitution and Induction of the ſaid Rector. But he ought to prove his Induction by the Defendants Confeſſions, or elſe by Witneſſes;

ſes: Becauſe the Mandate to induct, proves not the real Induction. But if a Vicar ſue in this Cauſe, and his right or intereſt is denyed by the Defendants who are convened as above, he ought not only to prove his Inſtitution and Induction, (in like manner as was ſaid of the Rector) but alſo that he hath (either by a Compoſition and Foundation of his Vicarage, or by a lawful Preſcription) the right of receiving the Tithes, which he ſues for: Becauſe a Vicar hath not the aforeſaid preſumption of the Law on his ſide. But if the Defendants do not deny, but confeſs the Intereſt of the Plaintiff, (that is, that he is Rector or Vicar) but do deny that they have ſubſtracted thoſe Tithes, having perhaps paid them, or compounded for them: Then the Plaintiff muſt alledge and prove, that the Defendants had ſuch Tithes at ſuch a time within the ſaid Pariſh, which they ſubſtracted, notwithſtanding the aforeſaid Monition. And he muſt alſo alledge, that the ſaid Defendants have incurred the Sentence of Excommunication (by reaſon of the Premiſes) to be pronounced, (or rather which is already pronounced and promulged) againſt ſuch as refuſe to pay Tithes, after a Lawful and Canonical Monition: And in the concluſion of this Petition or Allegation, he muſt deſire that right and juſtice may be done, and that the ſaid Defendants, may be pronounced to have incurred the Sentence of Excommunication aforeſaid, and that they may be denounced as ſuch: Which Allegation being admitted, if the Defendants being produced, do confeſs upon their Oaths, or otherwiſe that they had, and received certain Tithes within the ſaid Pariſh, and if they do not alledge and prove the payment of the ſaid Tithes, or ſome other Exception, and ſufficient Cauſe of Non-payment, the Judge may proceed upon the Plaintiffs Petition, to pronounce his Sentence, by word of Mouth, or in Writing, (*viz.*) he may pronounce the Defendants to have incurred the Sentence of Excommunication, pronounced by Law in this caſe (againſt ſuch as refuſe to pay Tithes, when due, notwithſtanding a Canonical Monition,) and that they are to be denounced as ſuch. The Defendants are alſo to be condemned in charges of ſute, neither are they to be abſolved from this Sentence of Excommuni-

cation, until they either pay or compound with the Plaintiff, for thoſe Tithes ſo deducted, and withheld from him, and do ſatisfie the Church for their contempt. But here are two things to be noted: Firſt, that although it be proved by the confeſſion of the Defendants, or by Witneſſes, that the Plaintiff is Vicar of the Church, and that the Defendants have Tithes becoming due, within the ſame Pariſh: If notwithſtanding this the Defendants do deny, that theſe Tithes do belong to the Vicar: The Vicar as is ſaid above, ought to prove his right to theſe Tithes, (becauſe he has not the preſumption of the Law on his ſide) or otherwiſe he muſt loſe his Cauſe. Secondly, Admit that the Defendants in theſe caſes, being denounced Excommunicate, do deſire to be abſolved from this Sentence, and to be reſtored to the Sacraments, and to the Communion of the faithful, and are ready to pay the Tithes which they withheld, or the true value of them, (if the Tithes are not extant *in ſpecie*, and to ſatisfie the Church for this their contempt; and yet the Rector deſires more, (as well as to the quantity, as alſo the real value) than is due for the ſame, and therefore doth refuſe to receive the Sum offered: The Defendants in this caſe may go to the Judge, who pronounced the aforeſaid Sentence, and (at their perils) depoſite the real value of all ſuch Tithes as were due, and deſire the Judge to decree the ſaid Rector to be called, to receive the ſaid Sum offered, and to ſhew cauſe, why the ſaid Defendants may not be abſolved from the ſaid Sentence of Excommunication, and be reſtored to the Sacraments of the Church, and the Society of the Faithful. If the Rector appears not, upon the return of this Citation, (thoſe things being obſerved, which the Law requires in that behalf,) the Defendant is to be abſolved in penalty of the Plaintiffs Contempt: Oath being firſt made, of his obeying the Law, and ſtanding to the Mandates of the Church, and his Contumacy Fees being paid; but not the charge of ſute: Becauſe thoſe are firſt to be Taxed, and the Party to be admoniſhed to pay the ſame. If the Plaintiff doth appear, and doth refuſe to accept the Sum offered in full payment; then the ſaid Sum, with the charges which are due by Law, and are to be Taxed by the Judge,

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is to be depoſited at the Act of Court, as in other Cauſes of Subſtraction of Tithes; and the Plaintiff ought to alledge, ſpecifie and prove, which and what Tithes the Defendant has ſubſtracted, and the value of them: And if he proves a greater Sum, than that which is offered, then he ſhall obtain the ſame with new charges. But if he doth not prove a greater Sum, then he is to be condemned in thoſe charges, which are made by the Defendant, whilſt this ſute depended, betwixt the Rector and his Pariſhioners, touching the quantity and value of the Tithes; and the Pariſhioners are to be releaſed, from the ſaid Sentence of Excommunication; becauſe it is not diſputed, as to right of Tithing or the right of the Church, but only touching the private right of the Rector, (*viz.*) touching the value and quantity; which belong to the ſole private, advantage of the Rector.

7. If in the Pariſh where the Defendant hath Tithe, there has been a cuſtom uſed, time out of mind, or for forty years together, at the leaſt, as to the manner of Tithing: That is, that the Tithe of all Grain, is to be paid by the Sheaf, and that the Pariſhioners are not obliged to break theſe Sheafs into Shocks or Stacks; this cuſtom being alledged and proved, the Defendant ſhall obtain the Cauſe. Likewiſe touching the Tithe of Hay; if the tenth Acre (uncut down) is ſet out according to the cuſtom of the Pariſh, in lieu of Tithe-hay, and none is paid in the Cock, this cuſtom ſhall alſo avail, if fully proved. Likewiſe if there is a certain Sum of Mony uſually paid, in lieu of Tithes, and not the tenth part of the Corn or Hay, *in ſpecie*: The Defendant ſhall alſo prevail, if he doth ſufficiently prove the cuſtoms or compoſitions aforeſaid. The ſame may be ſaid of all other cuſtoms, though leſs is paid by the cuſtom, than the tenth part of the Tithes are worth. Alſo the Immunities and Exemptions, or Priviledges, of not paying Tithes, may be alledged by any perſons, and are wont to be alledged before the Eccleſiaſtical Judge, (by ſuch as have Lands ſo exempt) who ought to admit theſe Allegations: And if they are proved, he ought to pronounce for the validity of the ſaid Priviledges, and diſmiſs the Defendant from the Petition of the Plaintiff (as to

those things sued for in his Libel) with his charges. But what Persons and Lands they are, which are exonerated, and exempt from Tithes, mention is made of them, in a Statute made 31. *Hen.* 8. Cap. 13.. Also real compositions, (that is such as are made betwixt a Rector, and the Parishioners, (that, is with the consent of such as have Interest) or as it sometimes falls out, betwixt a Rector and some Lord of a Mannor, for him and his Heirs to pay no Tithes at all, (but only a certain and a determinate Sum in lieu of them,) may be alledged before an Ecclesiastical Judge.

8. If any one is cited to answer in a Cause of Tithes, and has a mind to avoid being condemned in them, he must make an offer of the real value of them, at the beginning of the sute, before the Libel is given in, or at least before sute is contested. And that he must do to this effect. (*Scil.*) he must exhibit his Proxy for *N.* the Party Cited, and make his part for the same; and declare, that out of an intent to avoid sute, and to prevent an injust vexation and charges, he must offer in Court to *M.* the Proctor of the Plaintiff, such a Sum, for all and singular the Tithes due (to the said Plaintiff, from his said Client, or which are to be paid by the Law or the Custom of the Parish of O. together with the charges, which are due and to be taxed upon his said Client. If the Proctor of the Plaintiff, doth desire a time to deliberate of this, and consult with his Client, whether or no he will receive this Sum thus offered, in full payment, or in part, time is so to be given him, until the next Court day or longer, as the Judge sees fit. In which case the Sum offered, is to be deposited at the Act, into the custody of the Register, lest it should afterward be objected, that this offer was only verbal, and not real. And observe, that this depositing at the Act of Court, hath (for a long time, by the custom of all these Courts,) the same power and effect, as if this Sum had been Sealed to in a Bond; and as if all other solemnities, required to be done by Law, in these offers had been observed and performed.

9. If the Plaintiff, (either upon the time of this offer, or on the day which is given to consider of it, *&c.*) doth accept the Sum offered, in full payment, then he may desire

deſire that the Party making this offer, may be condemned in charges: Which the Judge accordingly doth. Then a Schedule of charges being given, the Judge doth Tax theſe charges, and decrees a Monition for the payment of them, as in other caſes.

10. Although the Defendant (being called to anſwer in a Cauſe of Subſtraction of Tithes, having an intent to avoid ſute and charges for the future) doth offer a certain Sum, (before the Libel is given) for all the Tithes that are due, together with the charges, and if the Plaintiff, upon that day aſſigned to deliberate of this offer, doth refuſe to receive the ſame in full ſatisfaction, and doth give a Libel, containing certain Tithes, extending to the value of the Sum offered, and doth proceed in the ſute, but doth not prove any more Tithes due to him, than thoſe, he ſhall obtain Sentence for the Tithes, mentioned in the Libel, or the value thereof, and alſo the charges of ſute, notwithſtanding the general offer, for all the Tithes, or for the whole thing due. For if there are *diverſe ſpecies* of Tithes due, (*Scil.*) Corn, Hay, Lambs, and the like, the Plaintiff may commence an Action, for the value of any of theſe ſpecies; and when he hath Inſtituted the ſaid Action he is not obliged to free the Defendant from all the other Actions. Therefore to avoid this Cautele and Condemnation, ſo ſoon as the Plaintiff doth give in his Libel, it is very convenient that the Defendant do offer particularly, *de novo*; that is ſuch a Sum for ſuch a Tithe, and ſuch a Sum for ſuch a Tithe, or elſe offer the Sum offered at the firſt, (if it extends to the value of the Tithes, mentioned in the Libel) or at leaſt another Sum with charges, for the Tithes mentioned in the Libel: And then if this offer is either excepted or refuſed, the Defendant is either to be condemned in, or abſolved from the charges, as is ſhown afterward. But yet in ſome years paſt, ſome Advocates were of a contrary opinion (ſo it was uſually adjudged) being induced thereto by theſe reaſons, (*viz.*) if the Defendant, before the Libel was offered, having a mind to avoid ſutes, and prevent injuſt vexations and charges, doth offer a certain ſum, in the name of all the Tithes that are due, with charges as before, and the Plaintiff takes a time

to deliberate and consider of this offer, and whether he will receive this Sum, in full satisfaction or not: If on the same day, he doth so refuse to receive the same, and doth afterward give a Libel, and proceed in the sute, endeavouring to prove a greater Sum due to him, than the Sum offered, and if he doth not prove more Tithes due to him, nor a greater Sum in the name of Tithes, than the aforesaid Sum first offered, but doth proceed in the sute, until Sentence be pronounced: In this case, the Plaintiff although he recover only the Sum offered, and his charges of sute, before the day of the offer; yet he is not to be condemned in charges of the whole sute, from the day of the aforesaid offer. And it is to be noted, that by the ancient custom of the aforesaid Courts, an offer of the Tithes being made, (although general) the Plaintiff was wont either to receive the same in full satisfaction of all the Tithes, or else refuse so to receive them. But if the Plaintiff do so refuse the same, and doth give a Libel, and prosecute the sute, and doth not prove a greater Sum due to him, this renders him of ill account, and he is therefore to be condemned in charges, from the day of the offer, *&c.*

11. If the Sum offered, is received in full satisfaction, and the Party offering the same is desired by the other Party) to be condemned in charges; and if the said Party offering, doth alledge and prove, (the Adversary denying it) that he offered the said Sum, before the sute was begun, from the time of executing the Citation, (at least before the day of the return thereof, and of the appearance of the Defendant,) and that the Plaintiff refused the Sum offered, or injustly refused to receive the same; then the Party offering, is to be absolved from, and the Party refusing, is to be condemned in charges made about the proof of this offer. But observe, that in this case (to prove that the Sum was offered and refused, before the sute was begun, and again upon the day of the Defendants appearance) is not sufficient to excuse the Party making this offer, from the payment of all charges; because by the Execution of the Citation, it is intended and presumed, that the Plaintiff doth now purpose otherwise, and doth (by the executing the Citation,) require the Sum offered:

And

And therefore, if there is not another tender made to the Plaintiff himſelf, (if he can be met with,) or otherwiſe at his houſe, before Witneſſes, or before an Eccleſiaſtical Miniſter, ſo as in all probability, the Plaintiff may have notice of the offer at the time of executing the Citation, or before the day of the Defendants appearance, the ſaid Defendant is in default, and is thereby injured. For if the Defendant had offered this Sum in manner aforeſaid, it may be preſumed the Plaintiff had not feed his Advocate and Proctor, nor had paid Fees about the certifying this Citation. Yet in this caſe, the charges are to be moderated, ſeeing the Plaintiff ſeems to be guilty of ſome malice and prejudice.

12. If an offer is made after ſute is conteſted, or rather after the Judge hath decreed that it ſhall be proceeded ſummarily and plainly, for all the Tithes Libellate, and the Plaintiff hath received the ſaid offer in full ſatisfaction; then the Sum offered is to be adjudged to the Plaintiff, by the Definitive Sentence of the Judge, and the Defendant is to be condemned in ſuch charges, as were made before this offer, together with the Fee of the Definitive Sentence; becauſe the Plaintiff (ſute being conteſted as above) could not receive the Sum offered, nor could he have the Defendant condemned in charges, but by the Sentence or Interlocutory degree of the Judge. But if the Plaintiff refuſeth to receive this offer, in full payment, and doth proceed and perſiſt in the ſute, endeavouring to prove a greater Sum due to him, if he makes default, he is to be condemned in all ſuch charges, as are made by the Defendant, ſince the day of the offer: And the Defendant (as above,) is to be condemned in charges, which are made in the ſute, before the day of the offer, together with the Fee of the Sentence.

13. If the Plaintiff believes that there are more Tithes due to him, which extend to a greater value than the Sum offered; then his Proctor (upon the day which is aſſigned the Plaintiff to conſider of this Sum,) muſt accept this offer, made by the Defendant, and the Sum offered, ſo far as they make on his Clients behalf, but if it makes againſt him in any thing, then he muſt diſſent and proteſt as to the

nullity thereof, and offer himſelf ready to receive the ſaid Sum in part of payment and not otherwiſe, and muſt give a Libel, and deſire that it may be proceeded ſummarily and plainly. Then the Defendant may take back the Sum offered, (though it is more ſafe to let it remain at the Acts of Court, whilſt the ſute depends) and make mention in the Acts of Court, that becauſe the Plaintiff hath refuſed to receive the Sum offered, in full ſatisfaction, he doth therefore take the ſame back. But obſerve, that in theſe offers of Tithes, if there are ſundry Tithes due, of divers kinds, you ought to be adviſed as to the manner of offering theſe Tithes, (*viz.*) whether or no the Party offering, ought to declare particularly, for what Tithes, and what, and which Sum is offered for the ſame: For ſome of our late Advocates are of opinion, that a general offer doth not avail, and that the Plaintiff may refuſe ſuch a general offer, without any dammage. But Mr. *Clarke* ſays he doth not remember, that he ever ſaw this practiſed or adjudged by the major part; for, for theſe forty years laſt paſt (ſaving ſome late years) this offer was wont to be made in general, (*viz.*) ſuch a Sum for all the Tithes; and then the opinion of the Practitioners was, that it was moſt ſafe for the Defendant to offer a groſs or general Sum, for all the Tithes (as above) than to offer any particular Sums; leſt perchance, the Party offering, ſhould not offer the juſt value of every particular Tithe, and ſo ſhould be condemned in charges. Yet in ancient practice, if the Plaintiff did deſire that the Defendant might offer particularly for thoſe Tithes, for which he had made a general offer; the Defendant was obliged to offer particularly for the ſame; at leaſt if the Plaintiff alledge that he intends to proceed for the Tithes *in ſpecie*, and to obtain Sentence to have the ſame *in ſpecie*, and not a Sum of Mony, or any thing elſe in lieu of them.

14. If a Libel is given before an offer of the Tithes is made, and the Plaintiff doth ſue in the ſame, for the Tithe of Milk, Cheeſe, or the like, which are not to be paid *in ſpecie*, by the cuſtom of the Pariſh, but only a certain Sum in lieu of them, is adjudged for every ſpecies of them; then if the Defendant doth offer a great Sum in gene-

general by the name of all the Tithes, and the Plaintiff doth accept the ſame in full ſatisfaction, it ſhall ſeem that this offer was made, for the Tithes *in ſpecie* according as is deſired in the Libel. In this caſe therefore, an offer may be made on this manner; for the milk of Kine, according to the cuſtom of the Pariſh, for every Cow two pence; and for every Acre (upon which thoſe Animals which are barren, do depaſture) four pence, according to the cuſtom of the Pariſh. And ſo of other things, for which Tithes, are not to be paid in kind. Then the Plaintiff if he accepts the offer, made on this manner, he acknowledgeth the cuſtom of the Pariſh. Let the Plaintiff be aware therefore how he accept this offer, though the true value of the Tithes is offered; for by accepting this offer, the Plaintiff doth acknowledge the cuſtom of the Pariſh, although the Defendant by a general offer, for all the Tithes Libellate, doth ſeem to recede from the cuſtom, and acknowledge the Tithes to be due in kind.

15. If an offer is made particularly, for ſuch and ſuch a Tithe, (ſpecifying the Tithes) the Plaintiff may receive any one of the Sums offered (and if ſute is conteſted before this offer, he may deſire that the ſaid Sum may be decreed to him, by the Sentence of the Judge, and that it may be pronounced for his right in that behalf; and he may conteſt for the other Sums offered, (becauſe the true value, or all the Tithes Libellate, are not offered) and he ſhall obtain charges of the whole ſute, if he proves a greater Sum due to him, than the Sum offered and refuſed, (or not received) by him, or that there are more Tithes due, *&c.* And if on the contrary, he doth not prove a greater Sum, or more Tithes, he ought to be condemned in charges as above.

16. If the Defendant is ſued for Prædial or great Tithes, (to wit) for the Tithes of Corn and Hay; if he has not ſeparated his tenth part, nor compounded with the Rector, or him who has the right of receiving thoſe Tithes; he ought to offer three times the value of thoſe Tithes; or admit the Defendant has ſet out the tenth part, but doth forbid or hinder the Rector, or other perſon who hath right to them, ſo as he cannot gather, or carry the ſame away with

with ſafety, the Defendant ought to offer twice the value of the Tithes: And this is provided by the Statute, (*Scil.*) three times, or twice the value in the aforeſaid caſes.

17. In a Cauſe of Tithes, though the Term Probatory be elapſed, and no Witneſſes are produced, yet the Plaintiff, if he doth requeſt it, is to be reſtored to his Term Probatory againſt it be elapſed; in order whereunto he muſt alledge that this Cauſe is a Cauſe relating to the Church, and that by the neglect of his Client, neglecting to produce his Witneſſes, within his Term Probatory, the Church is very much injured; wherefore he muſt deſire that his Party may be reſtored againſt his Term be elapſed. Then the Judge doth ſo reſtore the Party againſt his Term Probatory be elapſed, and doth aſſign him a new Term Probatory, in preſence of the Proctor of the Adverſe Party diſſenting and proteſting as to the nullity of this Petition, and the decree of the Judge, and alledging that this Reſtitution ought not to be made, referring himſelf to the Laws. But obſerve, that this Reſtitution ought only to be made, when a Clergy-man, and not a Lay-man, doth ſue for Tithes: And in ſuch caſe, where the right of the Church is diſputed; and not the particular right of the Rector, *&c.* that, is where the Defendant pretends, that there are no Tithes, nor any Sum due in lieu of Tithes, nor any Tithes in kind due at all. Yet if a Lay-man doth prove himſelf to be a Farmer, and the Defendant doth deny, that any Tithes ought to be paid to that Church whereof he is Farmer, then the Lay-man is to be reſtored as Rector. Mr. *Clarke* has ſeen this Reſtitution obtained twice or thrice in one Cauſe, in a contradictory Court, upon the aforeſaid Allegation. Yet if this Reſtitution be made oftner than once, the Judge is wont to condemn the Party, (who deſires a Reſtitution a ſecond time,) in charges for retarding the proceeding from the day of the firſt Reſtitution, until the day of the ſecond Reſtitution. The particular right or private advantage (of which mention is made above) is ſaid to be, when a Lay-man or Rector, in the aforeſaid caſe, doth not prove the quantity or value of the Tithes ſued for, nor that he is Rector or a Lay-farmer.)

18. If it is conteſted about a benefice, (*viz.* whether ſuch

ſuch or ſuch an one be Rector or Vicar, then the Proctor either of the Plaintiff, or of the Defendant may alledge, that whilſt the ſute depends, the Tithes and Profits of the Living in conteſt, are waſted; and it is to be feared, that the Parties will gather theſe Tithes by force of Arms; and alſo that by reaſon of this ſute, the cure of Souls is not ſupplyed, wherefore to avoid theſe inconveniencies, he muſt deſire, that the profits of the Living may be ſequeſtred whilſt the ſute depends, and that the Sequeſtration may remain in the hands of ſome other indifferent perſons. Then if it appears by the Acts of Court, that both the Defendants and the Plaintiff were Inſtituted to the Benefice in conteſt, though it doth not appear to the Judge, who hath the true right; or if Sentence is pronounced for the right of the one, againſt the right of the other, though it be appealed from that Sentence, or if it be conteſted betwixt two Rectors, about the right of the Tithes of ſuch a piece of Ground; the Judge in any of theſe caſes, may for the aforeſaid reaſons, decree the aforeſaid Sequeſtration, and commit the ſame to the Church-wardens, or other perſons of the ſaid Pariſh: Sufficient Bond being firſt given by them, for the due collecting and faithful keeping theſe Tithes, to the uſe of thoſe who have right to them, and that a juſt account ſhall be made of them, when they are required. This Sequeſtration being thus interpoſed, the Judge is wont to appoint a Miniſter to ſerve the Cure whilſt the aforeſaid ſute doth depend, and command the Sequeſtrators to pay him out of the profits, ſuch ſalary as the Judge ſhall appoint. And this Sequeſtration is to be publiſhed in the Pariſh Church, in time of Divine Service, that the Pariſhioners may have notice of it, and obſerve, that this Petition is wont to be made by that Party who is out of poſſeſſion of the Benefice, though this hinders not, but that the Party in poſſeſſion may alſo deſire a Sequeſtration for the reaſons afore-named. Now the ſute being ended, the Sequeſtration is to be releaſed, and the profits which are gathered, are to be reſtored to the Party who gets the Cauſe: And if the Sequeſtrators refuſe to pay the ſame, they are to be called to give account of the things by them received, and are to be compelled by the

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Eccleſiaſtical cenſures, to pay thoſe things received, *in ſpecie*, if they are extant, if not, then the real value of them. And if by frivolous delays or appeals, they injuſtly defer the ſute, and do not give an account, the forfeiture of their Bond may be ſued at the Common Law, (which was given at the time of granting the Sequeſtration) if the Judge (before or to whom this Bond was taken) is pleaſed ſo to order it. Which Judge, muſt give the Party grieved, thoſe Bonds and Letters of Attorney upon the ſame, to ſue and recover the penalty of the Bond, to the uſe of the Party ſo grieved.

19. So ſoon as it appears to the Judge, who pronounced the Sentence, (whether for the Defendant, or for the Plaintiff) that it is appealed from the ſame, the Judge may in theſe Cauſes, and (if it is requeſted of him,) he ought immediately to put the Sentence in Execution as to the charges, and Tax. the ſame, and compel the Party to pay them in all things, like as if it had never been appealed from his Sentence; and this alſo, notwſthſtanding any Inhibition which is ſerved upon him, by reaſon of the Appeal, interpoſed from the Definitive Sentence; and this is provided by Act of Parliament, *Anno* 32. *Hen.* 8. *Cap.* 7.

20. And although that Statute doth provide, that in a Cauſe of Tithes, though an Appeal be interpoſed from a Definitive Sentence, the Judge may execute his Sentence as to the charges, and may Tax the charges; yet ſeeing this Execution and Taxation ought to be made according to the exigence of the Law in that behalf, (that is, in the preſence of the Party Appealing, or in penalty of his Contempt, if he be Lawfully Cited, and do contumaciouſly abſent himſelf) it is Lawful to appeal from the ſame, upon the account of a nullity, notwithſtanding the aforeſaid Statute; and if the Judge doth exceed meaſure in the Taxation of theſe charges, (as when only ten pounds are due for the charges, he being offended perhaps that it is appealed from his Sentence, doth Tax them to forty pounds) alſo if the Judge doth excommunicate the Party whom he hath condemned in charges, for not paying the ſame, without giving him any Lawful Monition (at leaſt) to pay the ſame: The Party condemned in theſe charges, may

may appeal not only from this exceſſive Taxation, (but alſo from the ſaid injuſt Excommunication, as above) notwithſtanding the aforeſaid Statute. The reaſon is, becauſe in that Statute, it is provided in theſe words: And the Judge who pronounceth the Sentence, ſhall Decree or Tax the [ reaſonable ] charges of the Party obtaining the Sentence, notwithſtanding it be appealed from the Definitive Sentence, *&c.* See the Statute. Therefore if the Judge exceeds meaſure in the Taxation of charges, he exceeds the limits of his Commiſſion, mentioned in the ſaid Statute. Likewiſe if the Judge doth Tax thoſe charges illegally, *i. e.* in the abſence of the Party or his Proctor; or doth Excommunicate the Party illegally, for not paying charges without a Lawful Monition, to pay the charges Taxed, or before the day aſſigned for payment; in theſe caſes (as well as from exceſſive Taxation, *&c.*) it is Lawful to appeal, notwithſtanding the aforeſaid Statute. For every Statute which is ſet forth againſt the Common Law, is to be ſtrictly interpreted and taken, according to the Letter: And before this Statute was ſet forth, a Judge could not by Law, execute his Sentence (in a Cauſe of Tithes) as to the charges, or Tax them; (at leaſt he could not compel the Party to pay them) if it were appealed from his Sentence, to a ſuperior Judge; and if the ſaid Judge were inhibited or forbid to proceed. For at the time of making this Statute, all the learned Legiſlators were of this opinion touching the charges to be Taxed, or otherwiſe, what as is therein contained, would be void, *(Scil.)* that the Judge ſhould decree reaſonable charges; and alſo in a certain conſultation held betwixt the Eccleſiaſtical Judges, and the Judges of the Common Law of this Realm, in the aforeſaid caſe, (*viz.*) whether or no it were Lawful to appeal from an exceſſive and immoderate Taxation of charges, they were all of opinion, that it was Lawful to appeal in theſe caſes, notwithſtanding the aforeſaid Statute.

CHAP.

# CHAP. VI.

## *The whole order of proceeding in all Causes of* DEFAMATION.

### SECT. I.

1. *The word* [convitii] *ought to be contained in the Citation taken forth in this Cause.*
2. *What words the Libel ought to contain, and what ought to be proved in these Causes.*
3. *It is not Lawful to sue directly in these Causes, after a whole year is elapsed, from the time of uttering the words.*
4. *In what cases an Action of Defamation may be commenced, though a year is elapsed.*
5. *It is lawful to sue indirectly in a Cause of Defamation; that the Party defaming may be pronounced to have incurred the Sentence of Excommunication, after a year is elapsed.*
6. *Causes of Defamation commenced upon any Constitution, (in order to get the Defendant pronounced to have incurred the Sentence of Excommunication) are not to be Instituted at the instance of the Party, as in other cases, but of the Office of the Judge promoted and implored by the Party grieved.*
7. *The order of Reconvention in these Causes.*
8. *The manner of proceeding in these Causes, when the Party defamed sues for Defamatory words, contained in a famous Libel.*
9. *A Witness being produced in a Cause, if he is defamed by exceptions which are propounded against him, he may sue the Party propounding them, in a Cause of Defamation.*
10. *The manner of drawing the Libel in the Cause.*
11. *The manner of proving the said Libel.*
12. *The form of putting Sentence in Execution, in these Causes of Defamation.*

If

IF no Action can be commenced for thoſe words, (mentioned in the 1; Sect. of the 4th Chapter of the Firſt Part,) at the Common Law, then may the Party grieved, ſue in the Spiritual Court, for thoſe or the like reviling words, in a Cauſe of Defamation or Reproach. And obſerve, that this word [*Convitii* or Reproach] is wont to be writ in every Citation, together with the word [*Defamationis*, or Defamation] the reaſon is, (as Mr. *Clarke* has heard from more skilful Proctors) becauſe if the Plaintiff doth not prove that the Defendant uttered words, which of their own nature were Defamatory, yet if he proves that the words were reproachful, he ſhall obtain the victory: And then the Party uttering them, is to be puniſhed at the pleaſure of the Judge, conſideration or reſpect being had to the perſon defamed: The reaſon is, becauſe theſe words were uttered out of a malicious and angry mind, and beſides, and againſt all fraternal charity.

2. And although in a Cauſe of Defamation, it is ſaid in the Libel, that the words Defamatory were pronounced or uttered maliciouſly, and in a heat, yet if the words Libelled are Defamatory of their own nature, they are preſumed to have been ſpoke out of a malicious mind, although the malice be not proved. But in the aforeſaid Cauſes, when it is ſued for reproachful words, the Plaintiff ought to prove by grand preſumptions, as brawlings, chidings, (*Scil.* ſuch as proceed from malice and enmity,) that the aforeſaid malicious words were uttered out of a malicious mind: For otherwiſe, as was ſaid before, if the words uttered are not Defamatory of their own nature, they are not preſumed to have been ſpoke out of a malicious mind.

3. Seeing a Cauſe of Defamation is ſaid to be a criminal, or a mixt Cauſe, that is, partly Criminal and partly Civil, if the Party Defamed doth not commence an Action, or Cauſe of Defamation, and conteſt ſute in the ſame, within a year from the time of uttering the words, the benefit of an Action is taken away by the lapſe of the year; Mr. *Clarke* has often ſeen it thus adjudged, by the learned Judges:

Judges: For in this caſe, the Plaintiff ſeems to have remitted the injury, at leaſt he doth not ſeem to recall it to mind; eſpecially if the Party defaming, and the Party defamed (after the words are uttered) are very familiar and converſant together, in eating, drinking, and frequently ſaluting each other, or other ſigns of familiarity. But the Defendant intends to uſe the benefit of this exception, to wit, that a year is elapſed; it is expedient (at leaſt Mr. *Clarke* ſays it was ſo practiſed and conſulted, in a very weighty Cauſe, by the moſt learned, forty years ago) that he alledge the Premiſes, before the Cauſe be concluded, and refer himſelf to the Libel, the time of Conteſtation of Sute, the Proofs, and to the Law. Yet ſome of our late Advocates are of opinion, that it is ſufficient to acquaint the Judge with the Premiſes, after the Cauſe is concluded, at the time of giving Information in the Cauſe. Let the Plaintiff take heed therefore, (if it appear by the premiſes, that a year is elapſed from the time of uttering the words, until the time of inſtituting the Action) that he propound before the Cauſe is concluded, the reaſons why he did not proſecute this ſute within a year, from the time of pronouncing the Defamatory words.

4. Now although it may appear by inſpecting the Libel, by the depoſitions of the Witneſſes of the Plaintiff, and the time of commencing the Cauſe, that a year is elapſed betwixt the time of uttering the words, and Commencement of the Action; yet if theſe Defamatory words were uttered in the abſence of the Plaintiff, he being then perhaps in remote parts out of the Kingdom; and if he doth inſtitute the Cauſe, ſo ſoon as he returns, or at leaſt within a year after his return to thoſe parts, or that Pariſh, in which the Defamatory words were pronounced, and doth cauſe ſute to be conteſted in the ſame, his Action is not taken away. Therefore if it doth appear by the Depoſitions, that a year is elapſed from the time of uttering the words, and before the ſute is commenced, though nothing is depoſed by the Witneſſes, touching the preſence or abſence of the Plaintiff: Therefore to avoid the diſputes and queſtions in Law, the Proctor of the Plaintiff may alledge the probable Cauſes of his being ignorant that ſuch words were uttered againſt

him

him, (*viz.*) that at the time of uttering the ſame, he was out of the Kingdom, or in remote parts, far diſtant from the place, where thoſe words were uttered; and that he hath Inſtituted his Action, within a year after his return to thoſe parts, or that Pariſh where the Defamatory words were pronounced: Which things being proved, the Plaintiff ſhall obtain victory in the Cauſe.

5. Alſo though the Party defamed has notice of the Defamatory words, and doth not commence his Cauſe of Defamation, within a year from the time of uttering the ſame, and from the time of having ſuch notice; yet may he ſue in a Cauſe of Defamation, after a year is elapſed, alledging in his Libel, the Provincial Conſtitution which begins † *Authoritate vel patris omnipotentis*, &c. and that the Defendant did utter ſuch words, *&c.* that thereby he incurs the Sentence of Excommunication, pronounced in the ſaid Conſtitution: And in the concluſion of this Libel, the Plaintiff muſt deſire that right and juſtice may be adminiſtred, and that the Defendant may be pronounced to have incurred this Sentence of Excommunication. And Defamatory words being proved, (ſuch as contain any crime, comprehended in the ſaid Conſtitution) Sentence is to be pronounced, according to the matters requeſted in the Libel, (that is) that the Party defaming hath incurred the Sentence of Excommunication, and that he is to be denounced as ſuch; and the Defendant is to be condemned in charges made by the Plaintiff, and is not to be abſolved from this Sentence of Excommunication, until he doth ſatisfie the Church, that is, until he do penance to be aſſigned by the Judge, for ſtanding ſo long in the Sentence of Excommunication: For the Sentence of Excommunication pronounced in this caſe, doth afflict the Party from the day on which the Defamatory words were pronounced, and the Sentence pronounced in this caſe, is ſaid to be a Declaratory Sentence of the fact committed. But the ſatisfaction made to the Church, (whereof mention is even

† *Lindwood. de Senten. excommun. c. Authoritate Dei patris omnipotentis; quæritur ſi pars gravata, ſit infamata de crimine ante prolationem eorundem verborum per Reum; an Reus incideret in pœnam Canon. & excommunicationis? Sect. item excom. verb. unde quænam circumſtantiæ faciunt defamantem incurrere, pœnam hujus conſtitutionis, & quænam pœnitentia ſatisfacit, eleganter notatur in gloſſ. ſuper verb. quacumque de Cauſa.*

now made) is this; the Defendant convened ought first to confess, that he hath grievously offended God, by maliciously uttering Defamatory words against his Neighbour; and must name particularly (in the penance) the Plaintiff, and the Defamatory words themselves; and then he ought first to ask pardon of God, and afterward of the Party grieved. This penance, or rather this satisfaction to the Church, ought to be done either publickly in the Parish Church of the Party defamed, or of the Party defaming, or in any other place, to be assigned at the pleasure of the Judge, according to the quality of the Cause, and of the persons.

6. But seeing that in all other Causes, where any one is sued, or an Action is commenced against any one, to have him pronounced to have incurred the penalty of the Canon, or the Sentence of Excommunication pronounced in the Canon, the Plaintiffs who are grieved and injured in these cases, are not wont to commence their Actions directly in their own names, against the Parties offending, but only as Promoters of the Office of the Judge; imploring his Office in that behalf. For example, such an one laid violent hands upon a Clergy Man, for which thing he is Excommunicate, *ipso facto*: Or such an one kept a brawling and a disturbance in the Church, for which thing, he doth incur the Sentence of Excommunication, *ipso facto*: Or such an one hath Temerarily Administred the Goods of any one Deceased, or doth obstruct and hinder, so as the Deceaseds Will cannot have its effect, or so as the Goods cannot be prised and inventaried, by reason whereof, they are Excommunicate, *ipso facto*: The Parties grieved in these cases, are not wont (if they desire that their Adversaries may be corrected and pronounced to have incurred the Sentence of Excommunication inflicted by Law) to commence these Actions and Causes in their own names, but only to promote and implore the Office of the Judge, and Object and Article the aforesaid crimes to the Defendants, in the name, and of the Office of the Judge, by them promoted. Upon the like reasons therefore, Mr. *Clarke* is induced to believe, that in Causes of Defamation, (that the Defendants may be pronounced, to have incurred the Sentence of Excommunication) it is requisite that the Parties

ties grieved ſue not in their own names, but only as Promoters and Implorers of the Office of the Judge; in which caſes the effect or ſucceſs, may be expected, as in a Cauſe of Defamation, otherways inſtituted. But in regard not only at this day, but by ancient practice of the Courts of the Arch-biſhop of *Canterbury* theſe Cauſes of Defamation, (inſtituted as to the penalty mentioned in the Conſtitution) were and are wont to be commenced in the names of the Parties defamed, (*viz.*) to anſwer *N.* in a Cauſe of Defamation, and not of the Office of the Judge promoted, therefore Mr. *Clarke* ſubmits to the Judgment of the learned Judges and Advocates, whether or no it be more ſafe, to commence theſe Cauſes of Defamation, according as is practiced at this day, or in manner as was even now ſpoke in this number.

† *Reconventio eſt nihil aliud quam Actio Rei conventi adverſus Actorem, durante conventionis judicio viciſſim ſub eodem judice legitimè inſtituta. Ordo Cameral. p. 3. tit. 30.*

7. If any is cited to anſwer in a Cauſe of Defamation, if the Plaintiff hath alſo defamed the Defendant, the Defendant may in the very ſame Cauſe, reconvene the Plaintiff, † that is, he may give a Libel in preſence of the Plaintiff or his Proctor, though no Citation was firſt taken out againſt him. But in theſe caſes of Reconvention, the Parties muſt proceed together in the conteſting of Sute, * in the deſiring one and the ſame Term Probatory, in the production of Witneſſes, in the concluſion, and in the pronouncing of Sentence; and ſo on in all things, unto the end of the ſute: And (as Mr. *Clarke* has commonly known, and had it practiced) if Defamatory words, mentioned in the Libels are mutually proved, a mutual compenſation is to be made, both as to the Penance and the Charges; that is, there ought to be no Penance enjoyned, nor any condemnation in charges on either part. But it is otherways, where two ſeveral Cauſes of Defamation are commenced. And obſerve, that in Cauſes of Reconvention, though a Compenſation or a Compoſition may be made betwixt the Parties; yet ſeeing Defamers are by Law to be corrected, and are alſo by the Provincial Conſtitutions, to be denounced for Excommunicate

* *Reconventio in propriè & impropriè dictam dividitur. Illa debet experiri ſimultaneo proceſſu, ante litis conteſtationem; hæc vero ante ſit concluſio in Cauſa, ſed proceſſu ſeparato. Ummius diſput 10. n. 19. in fin. Jacob. Blum. proceſſ. Cameral. tit. 40. n. 12. Alciat prax. de reconventione fol. 123. Lanfr. c. ſæpe. n. 41. quando habet locum reconventio ibi tractatur, & n. 42, 43.*

perſons, the Judge may, if he will, correct theſe Defamers of his mere Office, at his pleaſure.

8. Now in ſuch caſe where the Party defamed ſueth for Defamatory words contained in a famous Libel, the Plaintiff muſt not only propound that Article which is ſo general and uſual in a Cauſe of Defamation, (*viz.*) that the Defendant upon ſuch a day, and in ſuch a place uttered ſuch words, (*Scil.*) the words contained in the famous Libel, *&c.* but alſo another ſpecial and particular Article, that upon ſuch a time, and in ſuch a place, the Defendant writ and publiſhed, or cauſed to be writ and publiſhed, a certain famous Libel, annexed to theſe preſents, [If the Plaintiff has the Libel, if not then he muſt ſay in this ſpecial Article] containing theſe following words, or the like words in effect, (and here muſt be inſerted thoſe Defamatory words, contained in that famous Libel.) Or if the Plaintiff has only a Copy of that famous Libel, the ſaid Copy is to be annexed to the Libel, which is given in this Cauſe of Defamation, adding theſe words, [the tenor of the Schedule annexed to theſe preſents, which he deſires may be accounted as read, and inſerted here.] And if the Plaintiff proves his Intention, the Parties defaming on this manner are to be puniſhed with a more grievous puniſhment, than thoſe who defame only with words.

9. Although the Plaintiff or the Defendant, may have propounded Exceptions againſt witneſſes, [for their defence, as they pretend,] containing Eccleſiaſtical crimes, and Defamatory words, for which the Witneſſes are lyable to be corrected in the Eccleſiaſtical Court; yet if they make default in the proof of theſe Exceptions, the Witneſſes may commence an Action, either before the ſame, or any other Competent Eccleſiaſtical Judge, againſt the Parties propounding theſe Exceptions, in a Cauſe of Defamation; notwithſtanding that the Party propounding the ſaid Exceptions, doth at the time of propounding them, proteſt that he doth not propound the ſame, with an intent to defame the ſaid Witneſſes, but only for his own juſt defence in the ſaid Cauſe: Which Proteſtation is wont to be inſerted at the end of the Exceptions, or at leaſt in the Acts, at the time of propounding the ſame.

10. In

10. In this Libel is inſerted not only thoſe general and uſual Poſitions, which are put in an ordinary Libel, in a Cauſe of Defamation, but alſo the ſpecial and particular Poſitions following are to be added. (*viz.*) *Item*, that upon ſuch a day and year, in ſuch a Cauſe, betwixt ſuch perſons, *M.* (that is the Plaintiff in this Cauſe) was produced in this Court (or in ſuch a Court, if the Cauſe of Defamation is not inſtituted in the ſame Court, where the Witneſſes were produced) as a Witneſs, and was ſworn and examined, as appears by the Acts of the Court, to which the ſaid Party thus propounding, refers himſelf. *Item* that *N.* the Party againſt whom the ſaid Witneſs, (now Plaintiff in this Cauſe) was produced, upon ſuch a day and year exhibited certain Exceptions, or rather a certain famous Libel; ſuch a Poſition whereof (containing the effect or tenor following) is ſpecified in the Schedule annexed to theſe preſents: And here muſt be inſerted, the Tenor of that Poſition, which contains the Defamatory words. *Item*, that the ſaid *N.* the Defendant in this Cauſe, hath made default in proof of the ſaid pretended Exceptions, or rather of the famous Libel, mentioned in the aforeſaid Poſition, or ſpecified in the Schedule, annexed to theſe preſents: And then the other ordinary Poſitions are to be inſerted.

11. If the ſaid Cauſe of Defamation is Inſtituted by the Witneſs in the ſame Court, in which the Party defamed was produced as a Witneſs; then after Sute is conteſted, and a Term Probatory is aſſigned, the Proctor of the Plaintiff may acquaint the Judge, that in ſupply of proof of the Contents of his Libel, already given in this Cauſe, he doth exhibit a certain Act diſpatched in this Court, (that is, the Act diſpatched on the day, in which the Exceptions were propounded) betwixt *N.* and *M.* (*viz.*) betwixt ſuch a Plaintiff and ſuch a Defendant in ſuch a day and year; and alſo thoſe particular Exceptions themſelves, and eſpecially ſuch a Poſition of them, propounded by the ſaid *N.* (the Defendant in this Cauſe of Defamation,) on the day and year aforeſaid given into Court, and remaining in the Cuſtody of the Regiſter of this Court, whereof mention is made in the aforeſaid Act: And then he muſt

alledge, that all and ſingular the things and matters contained in the ſaid Act, were had and done, like as is contained in the ſame, referring himſelf to the Acts and the Regiſtry of this Court, ſo far as they make on his behalf. If the Defendant in this Cauſe of Defamation, hath proved the ſaid Exceptions, in that firſt inſtance, wherein he propounded them, he may reply for his defence, that he hath proved and juſtified theſe Exceptions, and that he did not propound the ſame, with an intent to defame the Witneſſes, who is now Plaintiff, but only for his juſt defence in the Cauſe; which Allegation being admitted, in ſupply of proof of the ſame, he may in manner and form aforeſaid, exhibit the ſaid Acts, and the Depoſitions of the Witneſſs by him produced, upon the aforeſaid Exceptions. But admit the Defendant has not proved thoſe Exceptions in the ſaid inſtance, yet he may prove the ſame in this inſtance: And if he doth prove them, he muſt be diſmiſt with charges, from the inſtance of this Plaintiff, who pretends himſelf ſo defamed. But if this Cauſe of Defamation is not commenced in that ſame Court, in which the aforeſaid Exceptions were given, then to prove the Libel, the Act and the Exceptions aforeſaid are to be exhibited under the Hand of the Regiſter of the Judge, before whom they were given, or elſe by a publick Inſtrument, under the Seal of the Judge, and the Subſcription of the Regiſter: And ſo in all things elſe, the Defendant muſt prove as before, (*Scil.*) that he hath already proved the Exceptions given by him, in the firſt inſtance; and he muſt alledge and prove, like as is ſhewn [ touching the Exhibition of an Inſtrument, made upon an Extrajudicial Appeal ] this only excepted, that if the Proctor doth deny that ſuch Exceptions were given and propounded, the Plaintiff ought to prove it by Witneſſes, (*viz.*) by the Regiſter, the Actuary, the Scribe and their Clarks, or by a ſearch. And obſerve, that if the Proctor in the name of his Client, and by vertue of a ſpecial Proxy, did propound the ſaid Exceptions, the Defendant in whoſe name theſe Exceptions were propounded, muſt not be ſued, but the Proctor who propounded them. Therefore let the Proctor beware. It may alſo be enquired here, whether or no the Proofs which

which are made upon the aforeſaid Exceptions, when the Cauſe depends betwixt other perſons, and in the abſence of the Witneſs, do make full proof againſt this Witneſs, in order to juſtifie the proof of the ſaid Exceptions, in this Cauſe of Defamation. Admit they do make proof, yet the Party defamed may except againſt, and reprove thoſe Witneſſes, whether the Party (againſt whom they were produced in the firſt inſtance, or Cauſe) did except againſt them or not, at the time of their being produced to prove thoſe Defamatory Exceptions.

12. In order to get the Sentence put in Execution in this Cauſe, the Party who gets the Sentence, muſt certifie and exhibit a Citation, accuſe the contumacy, and make requeſt as is ſhown [touching the manner of putting the Sentence in Execution, in Plenary Cauſes] until you come at theſe words [and then a Monition is to be granted] inſtead of which words, the Party obtaining the Sentence, muſt deſire the Judge to decree the Party [againſt whom Sentence is pronounced] to be called to appear upon ſuch a day, to ſee Penance enjoined him, and to receive this Penance; as alſo that he may be admoniſhed to pay the Charges, and ſo on according to form. Which Petition the Judge grants; and if the Monition is executed upon the Party in due time and place, and is brought into Court with an Authentical Certificat, if the Party doth not appear, Penance cannot be enjoined in Penalty of his Contempt, at leaſt he cannot be admoniſhed to do the ſame, (the reaſon is, becauſe that although Penance might perhaps be enjoined in Penalty of his Contempt, yet the Party not appearing, he cannot be admoniſhed to perform the ſame) but he is to be Excommunicate in Penalty of his contempt: And if he appear afterward, the Judge may (at the Petition of the Plaintiff) aſſign the Defendant to do penance, for uttering theſe Defamatory words: (*viz.*) If the Defamatory words were uttered in a publick place, then the Penance is to be done publickly: Though it is wont to be done in the Pariſh Church of the Party defamed, in time of Divine Service, in preſence of the Party, (if he thinks fit to be preſent) but Linnen Veſtments muſt not be put on, as in Cauſes of

Correction. But if these Defamatory words are uttered in a private place, then the penance is to be done in the house of the Party defamed, or in the house of some honest Neighbour; and the said Penance is wont to be enjoined on this manner: The Party defaming must say publickly, that in saying such and such words, (*Scil.* those words which the Judge has pronounced in his Sentence, were spoke) he hath defamed the Plaintiff; and therefore he must first beg pardon of Almighty, and then of the Party defamed, for uttering these words. This Penance being ordered and enjoyned on this manner, the Judge at the Petition of the Party defamed, must admonish the Party defaming, to perform the said Penance on such a day, and to certifie under the Ministers Hand, (and the Hands of those who were present at the time of doing this Penance,) as to the manner of performing the same on that day; or else to appear upon the same day, to see himself Excommunicate, for not doing according to such Monition.

CHAP.

# CHAP. VII.

## *Of Double QUERELES. Their difference, and the whole order of proceeding in them.*

### SECT. I.

1. *Of a Double Querele in a Cauſe about a Benefice, what it is.*
2. *What things are contained in this Double Querele, and the form of it.*
3. *The manner of Executing this Double Querele, and what things are to be done by the Party who is preſented to the Living.*
4. *The manner of Obtaining a Citation* viis & modis, *if the Biſhop cannot be Cited.*
5. *In what caſe the Party preſented is not bound to expect the time aſſigned the Biſhop to Deliberate, as to the Inſtitution.*
6. *The form of Certifying the Double Querele.*
7. *The Petition of the Proctor, in order to get the Judge his Decree, when the Double Querele is returned, if the Biſhop appears not.*
8. *The form of the Oath to be taken by the Miniſter, to be Inſtituted to the Living.*
9. *The manner of proceeding in this Double Querele if the Biſhop doth appear.*
10. *Of a Double Querele in other Cauſes.*
11. *A Third Perſon may come in for his Intereſt in theſe Double Quereles.*

If

† *Gail. li. 1. obs. 28. & Tholos. de appel. li. 2. c. 28. vide tract. de jure patronatus Pauli de Cildinis. part. 6. art. 2. n. 2. pag. 585.*

IF a Clergy-man is preſented to a Church, † and doth exhibit this Preſentation before the Biſhop of the Dioceſe, or his Vicar General in Spiritual things, who has power to inſtitute, and doth requeſt to be inſtituted by him; if the Biſhop doth refuſe to inſtitute and admit him, he may complain thereof, to the Official of the Arches, or to the Judge of the Court of Audience, which Judges are wont to write back to the Biſhop in form of Law; to the following effects, and that Reſcript is called a Double Querele.

* *Non ſit inſtituenda ante lapſum 28. dier. juxta conſtitut. Eccleſiæ Anglicanæ, niſi alius ab epiſcopo ſit inſtitutus, ante decurſum rundem dium. Can. 95.*

2. The Double Querele * is to be drawn in the name of the Judge, who grants the ſame, and muſt be directed as an ordinary Citation is directed, and this Double Querele muſt firſt contain briefly theſe things, (*viz.*) that ſuch an one being preſented to ſuch Benefice now vacant, hath deſired Inſtitution, and the Biſhop hath refuſed to admit him. Then ought to be inſerted, not only the Monition, but alſo the Citation and an Inhibition as follows. (*viz.*) Firſt, the Biſhop or his Vicar General (who hath power to Inſtitute) muſt be admoniſhed to admit and inſtitute *N.* the Perſon preſented to ſuch a Church, within ſuch a time, (to wit,) within nine days, or ſometimes within fifteen days; three of which days, (if nine are appointed,) or five, (if fifteen are appointed,) are wont to be aſſigned the Judge, (from whom it is complained) for the firſt Peremptory Term, and three or five for the ſecond, and three or five for the third Peremptory Term, and a Canonical Monition: Which days being elapſed, and the ſaid *N.* not being inſtituted, nor Juſtice being adminiſtred, the Biſhop muſt be Cited to appear in Perſon or by his lawful Proctor (who is ſufficiently inſtructed) upon the tenth or fifteenth day, after the Execution of this Double Querele, (if it be a Court day) or otherways upon the next Court day, (as in an ordinary Citation) and alledge and ſhew a reaſonable and lawful Cauſe, if he hath or knows any, why (for this his neglect, and the not adminiſtring of Juſtice) the right of inſtituting and inducting, the Miniſter ſo preſented, may not occur to the Judge who grants this Double Querele, and why the Miniſter thus preſented, may not be inſtituted and inducted upon his Mandate.

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The Biſhop and his Vicar are alſo to be inhibited, that whilſt this Double Querele depends undetermined, they do not attempt to do any thing, in prejudice of the Party complaining, under Penalty of the Law. It is very neceſſary that this Inhibition be made; for ſometimes the Biſhop, or the inferior Judge, after the Execution of this Double Querele, and before it be returned, (at leaſt before the day of appearance) doth admit another Clergyman, to the great prejudice of the Party complaining, and in contempt of the ſuperior Judge. Which thing, if they do, they are ſaid to have committed a greater contempt than if they did it, where no Inhibition is: And ſuch an Admiſſion being made, (after the Execution of this Double Querele, and after the aforeſaid Inhibition, granted by the Judge who grants this Double Querele) is firſt of all to be revoked, and to be declared as null, and invalid. The Arch-biſhop alſo, (whoſe Juriſdiction and Authority is contemned in this caſe,) and likewiſe the Official of the Arches, (as appears by the ancient cuſtoms of that Court) may proceed againſt the Biſhop thus attempting, in a Cauſe of contempt, and may correct him at his pleaſure, Canonically; yea although the Perſon preſented, and obtaining this Double Querele, were found altogether unfit, in reſpect of his Converſation, his Manners, Religion and Doctrine. But the puniſhment and correction of the Biſhop † offending in this caſe, is wont to be referred to the Arch-biſhop himſelf.

† *Epiſcopus non poteſt ab officialibus Archiepiſcopi cenſura irretiri, ſi ipſe Archiepiſcopus ſit in provincia vel prope. c. 1. Sect. 1. de officio ordinar. n. 6. ubi. gloſſ. & D. D. in Decr. quos quidem ſequitur Ugolinus de Off. & poteſtat. epiſcopi c. 2. Sect. 2. n. 9. verb. octavo ab Officialibus.*

3. In order to get this Double Querele Executed, the Party preſented muſt procure ſome Literate Perſon to admoniſh the Biſhop, to Inſtitute the Perſon preſented, to adminiſter Juſtice, within the time mentioned in the Double Querele, and alſo to Inhibit him, according to the Tenor of the Inhibition therein mentioned likewiſe: Which being executed within three days, the Miniſter who was thus preſented, muſt go to the Biſhop, and with all due reverence, muſt deſire that he may be Inſtituted, and that Juſtice may be done him; and muſt offer himſelf ready and prepared to Subſcribe the Articles of Religion, (which are uſually ſubſcribed by the Clergy, at the time of their being admitted to Eccleſiaſtical Benefices) and to take the

Oath

Oath of Supremacy (according to the Statutes of this Realm, ſet forth on that behalf) and of his Canonical Obedience to the Biſhop, or any other Lawful Oath, required in this caſe. And this the Party preſented muſt do at two times more, within the time preſcribed, (*viz.*) upon each third day (if nine days are appointed,) or upon the fifth day (if fifteen days are appointed for the Inſtitution) at leaſt, if he can have the preſence of the Biſhop; if he cannot, then he muſt make a Proteſtation hereof, and requeſt Witneſſes to give their Teſtimony upon it: And if the Biſhop within the time aſſigned, takes no care to inſtitute the Perſon preſented, then theſe deliberatory days being elapſed, the Perſon preſented muſt take care that the Biſhop be Cited according to the Tenor of the ſaid Double Querele.

4. If the Biſhop doth abſent himſelf from the Mandatary, or rather is hindered by other urgent affairs, ſo as the Mandatary cannot cite him; the Mandatary muſt ſignifie (with all due reverence) to thoſe of the family of the Biſhop, that he hath a Citation, (*viz.*) a Double Querele, at the inſtance of *N.* the Miniſter preſented to ſuch a Benefice, to execute upon the Biſhop, and muſt deſire that he may come to the Speech of the Biſhop; which if he does not obtain, the Perſon preſented muſt expect that day, which was intended for the Biſhops appearance, if in caſe he had been Cited, and then get him called, and if he doth not appear by his Proctor, nor ſatisfie the Contents of the Double Querele, a Citation muſt be Decreed againſt him, *viis & modis*, as in other Cauſes; but before the ſame is executed, a Petition muſt be made by the Mandatary, to the intent that he may have acceſs to the Biſhop, to execute the Mandate upon him perſonally, and if he cannot ſo do, then the Citation is to be affixed to the outermoſt Doors of the Biſhops Palace, or of the Houſe where the Biſhop reſides, or elſe upon the Doors of the Cathedral Church of his Biſhoprick.

5. If the Biſhop is admoniſhed by the Mandatary, or is requeſted to adminiſter Juſtice, and admit the Perſon preſented as above, and after the aforeſaid Mandate is Executed, he doth refuſe expreſly to inſtitute the Perſon preſented

ted, or to admit him; then the aforeſaid Mandatary may immediately cite the Biſhop to appear as above; and the Party preſented is not bound to expect the time given in the Double Querele, † that is, he is not obliged to go to the Biſhop, nor to cite him, after the days aſſigned to inſtitute, are elapſed; the reaſon is, becauſe time was given him to conſider of it, and he by expreſly refuſing to inſtitute, doth refuſe the time given him to deliberate or conſider of it.

† *Imo vero cajus quo epiſcopus expreſſe dixerit ſe nolle admittere præſentatum, poteſt obtinere duplicem querelam non expectato decurſu* 28 *dierum, juxta Can.* 95.

6. The Mandatary ought to certifie the Party complaining, or his Proctor by Letters, or by a Subſcription indorſed on the back of the Double Querele, not only as to the day of the Execution of the Monition, made to the Biſhop to inſtitute the Party, but alſo as to thoſe days, in which the Party preſented did deſire himſelf to be inſtituted, alſo on what day he cited the Biſhop to appear, and on what day he inhibited him; and if the Biſhop refuſeth to admit the Party preſented, the Mandatary ought likewiſe to certifie that.

7. On the day aſſigned for the Biſhops appearance, the Plaintiffs Proctor muſt exhibit his Proxy for *N.* the Clergyman preſented to ſuch a Benefice, *&c.* and bring in the Original Mandate, with a Certificate indorſed thereupon, and muſt accuſe the contempt of *M. W.* the Biſhop, who was admoniſhed to inſtitute my Client, to the Church of *R.* within the time ſpecified in this Mandate, and to adminiſter him Juſtice, or otherwiſe to appear on this day, in this place, to ſhew cauſe, why through his neglect, the right of inſtituting the ſaid *N.* ought not accrew to this Court, and the Judge thereof: And ſeeing he has not taken care to inſtitute the ſaid Plaintiff, nor to adminiſter Juſtice, nor to appear, nor to alledge any Cauſe; wherefore the Proctor muſt deſire that he may be accounted contumacious, and in penalty of his contempt, that it may be pronounced and Decreed, as is mentioned in the ſaid Mandate, now brought into Court, (that is) that it may be pronounced for the Juriſdiction of this Court, and that the right of Inſtitution, *&c.* doth accrew to the Judge of this Court, through the neglect of the Biſhop. Then the Judge muſt cauſe the ſaid Biſhop to be called three times publickly, and

and if he doth not appear either by himſelf or his Proctor, the Judge muſt pronounce him contumacious, and in penalty of his contempt, he muſt pronounce the right of Inſtituting *N.* to the ſaid Rectory, to be devolved to his Court, through the neglect of the Lord Biſhop, and muſt decree the ſaid *N.* to be inſtituted to the ſaid Church, and that the Ordinary of the place, (*viz.*) the Arch-deacon ſhall be commanded to induct him. In theſe caſes, the aforeſaid call being made, the Judges are wont to remit the Miniſter preſented, to the examination of the Archbiſhop, that if he finds him capable, he may write back to the Judge, in order to have him admitted: Then a Bond muſt be entred by the Miniſter to be Inſtituted, to keep harmleſs the Judge (who Inſtitutes him) by reaſon of this Inſtitution, according to the uſe of the Regiſtry. In theſe and the like Cauſes, it hath uſed (time out of mind) that the Letters of Inſtitution are to be paſſed under the Seal of the Judge, and to be delivered to the Party, and a Mandate is to be decreed to the Arch-deacon of the place, for his Induction: Which Arch-deacon is wont and ought either Perſonally, or by his Official, really and actually to induct the Miniſter inſtituted to this Benefice, and give him real poſſeſſion of it.

8. Now the Miniſter preſented to a Living, before he is inſtituted, ought firſt to take the Oath of Supremacy, mentioned in the Act of Parliament, and then he ought to Subſcribe the Articles of Religion, mentioned in the ſaid Statute, and then he ought to Swear Canonical Obedience to the Arch-biſhop of *Canterbury*, and (if he be a Vicar) he ought alſo to Swear, that he will keep reſidence in his Vicarage.

9. If the Biſhop doth appear, and doth alledge ſufficient Cauſes, why he did not admit the Miniſter preſented, as for example, becauſe the Church is already full, by reaſon of another incumbent; or that the ſaid Miniſter is infamous, vicious, ſymoniacal, or one unlearned, ſo as that he cannot give an account of his Faith in the Latin Tongue, or that he hath another Benefice, much exceeding the Living in conteſt, in value: Then they muſt proceed in this buſineſs, as in other Summary Cauſes, and both Parties may reply, give Duplications, and except againſt the Witneſſes, as

in

in other Summary Cauſes: And if in the end, theſe Cauſes alledged by the Biſhop, are not prov'd, it muſt be pronounced as above, (by the Definitive Sentence (or the Interlocutory Degree) for the Juriſdiction of the Judge, and the Party preſented is to be Inſtituted, (the Premiſes before ſpecified being obſerved) and the Biſhop is to be condemned in Charges. But if the Biſhop doth prove the Premiſes objected, or any part of them (in order to ſtave off the Intention of the Plaintiff) why he was not obliged to Inſtitute the ſaid Miniſter, and that he is not contumacious for not Inſtituting him, (notwithſtanding he were admoniſhed as above) then Sentence is to be given for him, and the Miniſter ſo preſented, is to be condemned in charges, which are made on behalf of the Biſhop. But if the Biſhop will not conteſt, nor defend the aforeſaid Sute, the other Clergy-man, (who poſſeſſes the Benefice in controverſy, or is perhaps preſented to it,) is wont to take the Sute upon him, and appear and alledge, that the Church is full, in reſpect of his Perſon. But if theſe Alledgements are given on the part of the Miniſter preſented, and not of the Biſhop, the Judge of the Querele, is wont firſt to pronounce for his Juriſdiction in this behalf, and that the right of Inſtituting is devolved to him, and to his Court, (if none of the Premiſes obſtruct) becauſe the Biſhop hath alledged no Cauſe, why it may not be ſo pronounced: Yet theſe things ought to be done, in penalty of the contempt of the ſaid Biſhop. And though the other Miniſter who is thus preſented to the Living alſo, is wont to take this ſute upon him, yet if the Biſhop pleaſeth, and if he gives a ſufficient Mandate for it, the Clergy-man (who is alſo preſented to the Benefice in controverſy, and who intends to oppoſe the Admiſſion of the Party complaining) may Fee a Proctor, in the name of the Biſhop, to alledge thoſe Cauſes againſt the Admiſſion of the Party complaining: And in this caſe, becauſe theſe things are alledged in the Name of the Biſhop, they ought not to pronounce for the Juriſdiction of the Judge, unleſs in the event of the Proof, or non proving of theſe Alledgments. But obſerve, that if the Cauſe why the Biſhop hath refuſed to admit the aforeſaid Clergy-man, (who took out the Double Querele) be this, (*Scil.*) that

that another Clergy-man is alſo preſented to the ſaid Benefice, this Cauſe is not ſufficient, and concluding, ſo as to excuſe the Biſhops negligence. For if two Clergy-men are preſented to one and the ſame Benefice, the Biſhop to purge his negligence, ought to make an Inquiſition about the right of Patronage; and he is altogether negligent, (if while the Church is vacant) two Miniſters are preſented to the Living, and the Biſhop doth not proceed to an Inquiſition. But if it doth appear to the Judge, (to whom it is complained for Juſtice as above) that the ſaid firſt Clergy-man, thus complaining, ought not to be admitted, by reaſon of his Incapacity, or other defects, if the ſecond Clergy-man (exhibiting his Letters of Preſentation, to the Church in controverſy, and deſiring to be admitted to the ſame) is found capable, he is to be admitted by the ſaid Superior Judge, and is not to be committed to the Biſhop: Becauſe that in this Vacation, through the negligence of the Biſhop, the right of inſtituting doth accrew to the Superior Judge. But admit no Cauſe can be objected againſt the firſt Clergy-man, as to the ability of his perſon, and that (through the negligence of the Biſhop, alledging no cauſe, *&c.*) it be pronounced for the Juriſdiction of the ſaid Superior Judge, and admit that one of the Clergy-men doth inſiſt to have his Admiſſion to the ſaid Benefice, the Judge in this caſe, ought not to admit either of the Clergy-men, although nothing is objected againſt them, becauſe they are preſented by diverſe Patrons, but he ought to proceed in the buſineſs of Inquiſition, as to the right of Patronage; and then Inquiſition being made, the Judge ought to admit that Clergy-man, for whom the Verdict is given. Laſtly, The aforeſaid Clergy-men ought to take care reſpectively, that they exhibit their Letters of Preſentation to that Living in controverſie, within ſix months from the time of its being vacant, leſt perhaps the ſaid ſix months being elapſed, the Biſhop (to whom by reaſon of the lapſe of that Term, the Collation of the ſaid Benefice doth belong) do come in for his right, or another third perſon, to whom the Biſhop hath given the Living, by the lapſe of the Term: For in this caſe, ſix months from the day of the Living becoming vacant, is ſufficient to make the Term lapſed, notwithſtand-

withſtanding the dependence of the aforeſaid Sute, if the Patron or Patrons have or hath not preſented within thoſe ſix months. For it is not ſufficient for a ſecond or third Clergy-man to come for his Intereſt, in a buſineſs of Double Querele, commenced againſt a Biſhop, or that the firſt Clergy-man, who was firſt preſented, do alledge that he was preſented, but he ought to exhibit his Letters of Preſentation, and deſire his Admiſſion and Inſtitution, and then the time doth not lapſe.

10. Likewiſe alſo the Official of the Arches, or the Auditor of Cauſes of the Court of Audience, may write back by way of Double Querele, † in any other Cauſe, where Juſtice is denyed, not adminiſtred or delayed; to wit, if the Inferior Judge doth refuſe, or injuſtly defer to prove a Will exhibited by an Executor, or to grant an Adminiſtration to the next of Kindred who deſires it; or doth refuſe to revoke an Adminiſtration, which is illegally granted againſt the Law and the Statute; if this Petition be made upon three ſeveral Court days, and that it may be done inſtantly, the aforeſaid Superior Judge may write back to the Inferior Judge, by way of Double Querele, in manner and form as in the following caſe. If a Judge in remote parts, or the Biſhop of any Dioceſe, or his Official, or any other Eccleſiaſtical Judge, doth aſſign to hear Sentence in any Eccleſiaſtical Cauſe, for four or more Court days together, and ſhall be informed by the Party who deſires the Sentence, as well in matter of fact, as in the Law, and yet the Inferior Judge, will not, or doth unjuſtly defer to pronounce Sentence, either for the Plaintiff or the Defendant, though he be often called upon, and requeſted very earneſtly, and at ſeveral times to do it, (*Scil.*) three ſeveral Court days, either of the aforeſaid Judges of the Arches, or of the Audience, may at the Petition of the Party grieved, write back, by way of a Double Querele, and admoniſh the Inferior Judge to Pronounce Sentence, and Adminiſter Juſtice, within ſome convenient time, (*viz.*) within fifteen days as above, or otherways he muſt be Cited to appear upon the fifth, ſixth or tenth day after the Execution, *&c.* (according to the diſtance of the Judge, (from whom it is complained)

† *Marranta Speculator verb. & quidoq; appellatur. n.* 114. *uſq; ad n.* 122.

from the Court of the Judge, (to whom it is complained, *Scil.* the Superior Judge) to ſhew cauſe, why (by reaſon of his negligence, in not adminiſtring Juſtice,) the right of proceeding in the ſaid Cauſe, (according to the Acts, and things done before the ſaid Judge, at the time of Executing the ſaid Double Querele,) and the right of Pronouncing Sentence, may not be devolved to the ſaid Court, and the Judge thereof: And it muſt be proceeded in all things, as above; that is, if the Inferior Judge being Cited and Admoniſhed, doth not appear, nor doth alledge any concluding Cauſe, why he hath not done the Premiſes, contained in the Double Querele, he is to be pronounced Contumacious, and in Penalty of his Contempt, it is to be pronounced for the Juriſdiction of the ſaid Superior Judge, and it is to be proceeded in the Cauſe, according to the former Acts, and as is uſually proceeded in the aforeſaid Caſes, about the proving of a Will, or the granting of an Adminiſtration; and then a Monition is to be decreed, (when it is complained for the not Pronouncing Sentence) as well for the Proceedings, as againſt the Party Querelate, that is, the Adverſe Party, to appear on ſome day, to ſee further Proceedings made in his preſence according to the form of the former Acts, and eſpecially to ſee and hear a Term aſſigned, on which Sentence may be pronounced, and to ſee Sentence pronounced on that Term. If the Party Cited doth appear, and if the Proceedings are tranſmitted, they muſt procced as in other Cauſes, according to the form of the former Acts, before the Judge to whom it is complained: But if the Adverſe Party appears not, he is to be Excommunicate for his Contempt, thoſe things being obſerved, which the Law requires ſhould be obſerved in that behalf. Likewiſe if a Judge and a Regiſter, do not take care to tranſmit the Proceedings, according to the Monition, they are to be Excommunicate, as in a Cauſe of Appeal. Yet obſerve, that if the Party complaining, doth deſire expedition in the Cauſe, and doth juſtly ſuſpect, that his Adverſary (with intent to protract the Sute) will not appear, but will rather undergo the Sentence of Excommunication, and will perſiſt in the ſame, forty days together, he may

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get a clauſe of Intimation inſerted (in the above mentioned Citation againſt the Adverſe Party, to ſee Proceedings made, according to the form of the former Acts,) that if the Party Cited doth not appear, then the Judge doth intend to proceed according to the former Acts, and alſo to the Pronouncing of the Definitive Sentence, incluſively. In this caſe of Citation and Intimation, the Judge may proceed, and pronounce Sentence, in Penalty of the Contempt of the Party Cited, and the Proceedings are valid. Likewiſe the Superior Judge, may at the inſtance of the Party grieved, write back, by way of a Double Querele, if a concluding matter, or Allegation is given by the Plaintiff, or the Defendant, and the Inferior Judge, (though he is often called upon, and requeſted inſtantly, (and that upon three ſeveral Court days,) to admit the ſame) doth not admit the ſame, or doth injuſtly defer the Admiſſion of it, by aſſigning to hear his pleaſure from one day to another, upon his admiſſion thereof, and ſo doth injuſtly defer the Sute, the Party thus grieved, may alſo appeal from this delay, as is ſhewn in Cauſes of Appeals: But to avoid expence, the Parties grieved in this caſe, do chooſe rather to obtain a Double Querele, than an Inhibition; believing and hoping that the Inferior Judge will admit the matter, or Allegation, and adminiſter Juſtice, and pronounce Sentence, rather than the Cauſe by means of this Double Querele, ſhould be tryed before the Superior Judge; by reaſon whereof the ſaid Inferior Judge would loſe his due Fees, which are due to him for the Proſecution, and diſcuſſing of this Cauſe. For in a caſe of Double Querele, if the Judge is admoniſhed to adminiſter Juſtice, and doth do it, upon ſuch Monition, the Proceedings are not to be tranſmitted, but it is otherways in Cauſes of Appeal.

11. In a Cauſe of a Double Querele about a Benefice, a third perſon may come in for his Intereſt, as is ſhewn at the Firſt Chapter, and Firſt Sect. of this part, at the Eighteenth Number.

# CHAP. VIII.

## *The manner of Proceeding in the buſineſs called the* RIGHT *of* PATRONAGE.

### SECT. I.

1. *What the Right of Patronage is.*
2. *The reaſon, manner, and order of the Biſhops appointing a day to proceed in this buſineſs, and a Monition againſt the Patrons, and the Clerks preſented; and the whole order of making preparation for the enquiry about this buſineſs.*
3. *The tenor or effect of the Articles which are to be adminiſtred in this buſineſs.*
4. *The manner of Proceeding in the ſaid buſineſs of inquiry at the time of the return of the aforeſaid Citatory Mandate.*

THE Right of Patronage is a power (belonging to the Patron for certain Cauſes) of preſenting to the Biſhop, a Miniſter to be inſtituted to an Eccleſiaſtical Office or other Benefice becoming vacant. †

† *Vid. Lancellot: Aliter vero definiunt Rochus de Curte tract. de jure patron. c. 1. n. 14. Anton. de Butrio lectur. ad tit. de jure patron. n. 1. Conf. Joh. Nicol. Delphin. tract. de jure patron. n. 23. Beſold. diſſert. de patrocinio & client n. 56.*

2. If two Patrons have preſented Clergy-men to the Ordinary reſpectively, and theſe Clergy-men do inſiſt to have their Admiſſions, and the Biſhop by admitting the one, doth reject the other; he that is rejected, or at leaſt his Patron hath an Action againſt the Biſhop, (not in the Eccleſiaſtical Court) but at the Common Law; and may bring a *Quare Impedit*, or the like Action againſt him. There-

* Therefore in these cases, the Bishop is wont to decree that it shall be proceeded in the business which is called the Right of Patronage; that is, the Bishop is to appoint a certain day, to sit in the Church which is vacant, and must decree a Monition against the Patrons who present, and the Ministers that are presented to be present then, to see the Proceedings made in this business, according as the Law requires; against which day, the Bishop must take care, that six Clergy-men, and six Lay-men (who are Neighbours, or live near the said Church) be Cited to the effect here mentioned, (*Scil.*) to be present at the day and place assigned, to take the Oath of making a faithful enquiry, upon certain Articles, then and there to be administred to them, touching an enquiry about the Right of Presentation to the said Benefice. A publick Edict is also to be decreed against all who have, or pretend to have any right or interest in the said business, that they be present on the day and place aforesaid, to propound their Interest in that behalf, if they have any: And against the day of the appearance of the said persons so Cited, as well in general, as in special, Articles are also to be drawn, which are to be enquired upon, by the Parties Sworn; but the publick Edict is to be affixed to the outermost Doors of the Church in controversy, in time of Divine Service.

** Some are of opinion that the Bishops now adays will be easily drawn to gratifie one of the Clares or Patrons rather than the other, and Institute him, add make themselves liable to a Quare Impedit; so that quod dicunt de jure patronatus, is now almost quite out of use.*

3. The Articles are these: First, who hath or did present last, to the Church of *N.* at the last Vacation, as also for the two or three last times, of the said Living being vacant. *Item*, whether or no the person or persons who presented the last two or three Vacancies, have presented upon his or their own Titles. *Item*, whether or no either of the Clergy-men presented, be noted, or suspected for any notorious Crime, as of Hæresy, Symony, Perjury, Adultery or Drunkenness. *Item*, whether or no either of the Clergy-men now presented, hath given or promised any Monies or reward by himself, or by any other person in his name, or by his consent or approbation, directly or indirectly, (in order to obtain a Presentation to the said Benefice) to the Patron thereof, or to any other who

hath preſented the ſaid Clark, or procured him to be preſented.

4. The aforeſaid Mandates, as well againſt the Clergy-men, and the Lay-men, as alſo againſt the aforeſaid perſons, as well in ſpecial, as in general, ought to be duely and authentically certified, (*viz.*) either by the perſonal Oath of the Mandatary, or by an Authentical Certificate, authentically Sealed, and writ on the backs of the aforeſaid Mandates; and the Parties Cited, as well in ſpecial as in general, being publickly called, and appearing, it muſt be proceeded in the ſaid buſineſs, in their preſence, and in Penalty of the Contempt of the Parties who do not appear; they being firſt pronounced contumacious, according to the Tenor of the aforeſaid Mandates, and the Lay-men and the Clergy-men, are to be Sworn to make a faithful enquiry upon the Articles then miniſtred, and publickly read, and delivered to them, and of returning in their Verdict or Judgment, upon the ſame day, or if the Cauſe be dubious, within two or three days; and if the aforeſaid Jurors, or enquirers, do return their Verdict, that ſuch a Patron, or perſon preſenting, was in poſſeſſion of the Right of Preſentation, at the time of the laſt Vacation, the Clergy-man of this Patron, (if none of the aforeſaid Articles obſtruct) is to be admitted. And here it is to be noted, that the aforeſaid Patrons, are wont to take care, that Advocates, and thoſe who are skilled in the Statute Laws of this Realm, be preſent at the time of Executing the aforeſaid Inquiſition, to inform the conſciences of the Jurors; and to exhibit, at leaſt to ſhew theſe Inquiſitors the Inſtruments, and all manner of Evidences, for the proof of the Law, about the right of Preſentation.

CHAP.

# CHAP. IX.

## *The whole order of Proceeding againſt* TEMERARY ADMINISTRATORS.

### SECT. I.

1. *When and in what caſe this Action doth lye, and when an Action of Detinue doth lye, and what words are moſt fit to uſe in the Articles given in this Cauſe.*
2. *What things are neceſſary and preparatory to be done, before this Action be begun, in a Cauſe of Temerary Adminiſtration.*
3. *The Tenor of the Sentence in this Cauſe.*

WHen one *citra mortem teſtatoris*, gets goods of the Deceaſeds into his hands and poſſeſſion, then do Articles properly lye, *in Cauſa Temeraviæ Adminiſtrationis*: When he had them, *ante mortem teſtatoris, & poſt mortem detinet*, then the Law preſumes he had, and hath them, *ex traditione defuncti dum vixit*; and in that caſe, an Action of [*Detinue*] doth lye: And therefore, if in this laſt caſe, you ſue in a Cauſe of Temerary Adminiſtration, a Prohibition will lye; but in your Articles, uſe not the word [*Detinet*] but other words, [as *habet occupat*, &c.] for *Detinet* will give ground for a Prohibition, more than the other.

2. Before theſe Cauſes of Temerary Adminiſtration are commenced, the Executor ought to ſhew to the Party who doth Temerarily Adminiſter the Goods of the Deceaſed; the Will of the Deceaſed under the Seal of the Judge who proved it; likewiſe the Lawful Adminiſtrator ought to ſhew the Adminiſtration of the Deceaſeds Goods, under the Seal of the Judge who granted it, that ſo it may appear to the ſaid Party, that the ſame Goods are Lawfully Adminiſtred: And he muſt alſo call upon, and requeſt the

ſaid Party to be Cited, to deliver him the Goods of the Deceaſed, which are in his cuſtody, to the end that they may be Apprized and Inventoried; as alſo that the Debts and Legacies of the Deceaſed may be paid, and that the ſame may be Adminiſtred by the Executor or Adminiſtrator, according to the Deceaſeds Will, and that the ſaid Will may have its effect, according to the Teſtators intention: All this the ſaid Executor or Adminiſtrator muſt do, before Witneſſes. If any who keeps theſe Goods without Lawful Authority, being requeſted on this manner, doth refuſe, or doth injuſtly defer to deliver them, then the Party grieved, may ſue this Temerary Adminiſtrator, in a Cauſe of Temerary Adminiſtration of the Deceaſeds Goods; or rather he may Cite the ſaid Party, to anſwer Articles touching his Souls health, and eſpecially concerning the Impediment of the Execution of the Deceaſeds Will, and the Temerary Adminiſtration of the Deceaſeds Goods, to be objected at the promotion of the ſaid Executor or adminiſtrator.

3. The Tenor of the Sentence in theſe caſes of Temerary Adminiſtration of the Goods, ought to be ſuch or the like as follows, (*viz.*) that ſuch an one is Executor or Adminiſtrator of the Goods of *N.* Deceaſed, and that all the Goods of the ſaid Deceaſed, do fall under the ſaid Adminiſtration, to pay the Deceaſeds Debts and Legacies, and that ſuch an one, (*Scil.*) the Defendant doth keep ſome Goods of the Deceaſeds, † eſpecially ſuch and ſuch [ here ſpecifie thoſe Goods, which are proved to be Adminiſtred by the Defendant, whether by Witneſſes, or by the confeſſion of the Adverſe Party ] are Temerarily Adminiſtred, by reaſon whereof the Executor or Adminiſtrator hath been, and is ſo hindred, as that he cannot Adminiſter the ſaid Goods, and make an Inventary of the ſame, and pay the Debts and Legacies, (if it be the Executor who ſues in this Cauſe) of the ſaid Deceaſed, and prove the Will, *&c.* and the ſaid *N.* that is, the Defendant is to be pronounced to have incurred the Sentence of Excommunication * pronounced againſt theſe perſons, and that he is a perſon who is Excommunicate, *ipſo facto*, and as ſuch is to be denounced publickly, and he is to be condemned in Charges.

† *In petitione hæreditatis Actor non tenetur probare defunctum habuiſſe dominium illius rei, tempore mortis, ſed ſatis erit, rem illam in ejus hæreditate manſiſſe. ff. de pet. hæred. Covar. pr. q. 12. n. 2. Sect. erit quidem.*

* *Lind. de teſtam. c. Statutum verb. cæter. contingit.*

But

But here it is to be noted, that the aforeſaid Sentence pronounced in manner and form aforeſaid, and the ſame being verbally Executed, the Judge is not wont to decree a Monition againſt this Temerary Adminiſtrator, for the payment or delivery of the ſaid Goods, Temerarily Adminiſtred, but Publication or Denunciation being made of the ſaid Sentence of Excommunication pronounced by Law, in the aforeſaid caſe) in the Pariſh Church of the Temerary Adminiſtrator: And if the Defendant doth perſiſt in this Sentence of Excommunication, forty days together, after the ſame is denounced, he is to be ſignified to the Kings Majeſty, and is to be Impriſoned upon the Writ, *de Excommunicato capiendo*, and is not to be abſolved † until he reſtore thoſe Goods, which he Temerarily hath adminiſtred and ſatisfied the Church for his Contempt, and pertinacious Contumacy; yet the Judge may proceed to Execution of the Sentence, as to the Charges, like as in other Eccleſiaſtical Cauſes.

† *Si abſolut. fuerit valet abſolutio non vocato Actore, ſed Actori appellandum eſt. Specul. de contuma. Sect. nunc dicem. 4. n. 12. Bover. ſing. verb. Abſolutio. n. 1.*

*p.* 367.

CHAP.

# CHAP. X.

## *The manner of Proceeding in a Cauſe of* DILAPIDATION.

### SECT. 1.

1. *Againſt whom the Cauſe of Dilapidation is to be commenced.*
2. *Of the Cauſes which excuſe a Biſhop, Rector or Vicar, and their Executor or Adminiſtrator from being condemned in Dilapidations.*
3. *The manner of proving Dilapidations, and the Ruines of the Premiſes.*
4. *The Defendant for his defence, is to be admitted in a Cauſe of Dilapidation, to produce Work-men to inſpect the Ruines mentioned in the Libel.*
5. *In what caſe the whole Ruines are not to be allowed to the Incumbent.*

IF a Biſhop, Rector or Vicar, ſuffer their Pallace, Manſion, Churches, Chancel, Chappels, Houſes, or other Edifices whatſoever (belonging to that Biſhoprick, Rectory or Vicarage, whereof they were lately Biſhop, Rector or Vicar) to fall down; then the next Succeſſor may Sue the Predeceſſor, in a Cauſe of Dilapidation or Ruine of the ſaid Biſhoprick, Rectory or Vicarage; and the Biſhop, Rector or Vicar may Sue in the aforeſaid Cauſe, againſt the Executors or Adminiſtrators of the laſt Incumbent, yea though the Dilapidations or Ruines, happened not in their times, but in the times of their Predeceſſors. The reaſon is, becauſe thoſe Executors and Adminiſtrators have the like Action againſt the Executors and Adminiſtrators of their Teſtators, Predeceſſors, and may recover the value of the Repairs againſt them; and if this Action be not thus commenced, they cannot recover Repairs otherways.

2. If

2. If a Cauſe of Dilapidation is commenced againſt a Biſhop, Rector or Vicar, in whoſe time the Dilapidations ſued for did not happen; if the Biſhop, Rector or Vicar, doth alledge and prove that theſe Dilapidations did not happen in the time of his being Incumbent, and that he for that ſpace of time wherein he was Incumbent, (conſidering the yearly value of the Biſhoprick, Rectory or Vicarage, and the Charges Incumbent about the ſame, together with the congruous and neceſſary Suſtentation and Hoſpitality, which ought to be allowed him, according to his Dignity) hath expended and laid out a ſufficient Sum, about repairing the things named in the Libel, and that he who was Incumbent before him, (by whom the Premiſes were ſuffered to come to ruine) dyed ſo in debt, that he had not Goods at the time of his Death, which were ſufficient to repair theſe Dilapidations: Or that the ſaid laſt Incumbent, did Inſtitute an Action againſt his Predeceſſor, in whoſe time theſe Dilapidations did happen, and that whilſt this Sute did depend, this Incumbent dyed, leaving no Executors, being ſo much in Debt, as none durſt or would adminiſter, or enter to his Eſtate or Goods: Or that he did commence a Sute againſt the Executors or Adminiſtrators of the laſt Incumbent, and that they were freed by the Sentence of the Judge, upon their Plea of a *Plenè Adminiſtravit*, and the inſufficiency of the Goods: Or that he obtained Sentence againſt the Executors or Adminiſtrators, and that they were Impriſoned by vertue of the Execution of this Sentence, and dyed there, leaving no Goods, at leaſt which were ſufficient to pay the Dilapidations adjudged, and that he hath uſed all diligence poſſible, for the recovery of theſe Dilapidations.

3. So ſoon as the Biſhop is inſtalled to his Biſhoprick, and the Rector or Vicar are inducted, they may procure Work-men, as Houſe-carpenters, Brick-layers, and the like) to inſpect and view all the buildings which are fall'n, or thoſe which want repair, and they may write down for what Sum, every Work-man may and will re-edifie and repair the ſame; and then the Work-men may put their hands to this Paper, that they remember the ſame, when they come to be produced as Witneſſes. For this Inſpection

ſpection being made, the Biſhop, Rector or Vicar may commence his Action when he pleaſeth. That theſe Workmen may prove the intention of the Plaintiff, they ought to depoſe that ſuch a Ruine cannot be ſufficiently repaired or amended, for leſs than ſuch a ſum; neither would they (if in caſe they were to be hired to it) willingly repair theſe Ruines for a leſs ſum: And that this may make a full proof, it is requiſite that there be two Witneſſes of each craft, required in and about thoſe repairs; for one Brick-layer is not ſufficient to prove what Brick-work is required, nor is one Carpenter ſufficient to prove what Timber is requiſite, nor one Smith, what Iron is wanting, *&c.*

4. If the Plaintiffs Witneſſes, produced in this Cauſe of Dilapidation, do depoſe (either in favour of the Party producing them, or becauſe the Party producing them, hath promiſed to ſet them on work to build up, and repair theſe Ruines) that theſe Ruines cannot be repaired without an exceſſive or great ſum (as the Defendant thinks it at leaſt) the Defendant in this caſe, may alledge this exceſs, and may propound particularly, that ſuch and ſuch things Libelled, may be well and ſufficiently repaired and amended, for ſo much, and ſuch a ſum. And to prove theſe Alledgments, the Defendant ought to be admitted to produce Work-men, upon the Premiſes, to inſpect all and ſingular the Ruines and Dilapidations Libelled; and the late Biſhop, Rector or Vicar is to be admoniſhed to permit theſe Work-men to make ſearch, and to inſpect theſe Ruines, and alſo that he permit the Defendant or his Proctor to be preſent with them, if they think fit. Exceptions may be propounded againſt the Perſons and Depoſitions of the Work-men, as well of the Plaintiff, as of the Defendant, and the Parties in conteſt, may mutually reprove the Relation or Judgment of theſe Work-men, by others who are more skilful.

5. If the Biſhoprick, Rectory or Vicarage hath been vacant, and deſtitute of a Paſtor for three or four years, or the like time, before the Inſtallation of the Biſhop, or the Induction of the Rector or Vicar, who intends to Sue in a Cauſe of Dilapidation; in which Vacancy, 'tis probable very many Ruines might happen; or if the Biſhop, Rector

or

or Vicar, doth not inſtitute his Action in a Cauſe of Dilapidation, within ſome years from the time of his Inſtallation or Induction, nor hath taken care to get theſe Ruines inſpected by Work-men, within ſo many years, in which time it is very probable many Ruines might happen as before: In theſe caſes, though the Biſhop, Rector or Vicar have proved the aforeſaid Ruines, when inſpected (after ſo many years) by the Work-men, did extend to ſuch a ſum; he ſhall not recover the whole ſum, but only ſuch a ſum is to be allowed, as the aforeſaid Work-men ſhall judge, might probably happen, betwixt the time of the Living being vacant, and the time of inſpecting the Ruines. Therefore the Defendants Proctor ought to beware, in theſe caſes, that (amongſt other Interrogatories, which he Adminiſters the Witneſſes of the Adverſary,) he do alſo Interrogate thoſe Witneſſes, to what, and how great ſum (in their Judgments and Art) the Ruines (of thoſe things, mentioned in the Libel) which happened in the time of the Vacancy, or before the aforeſaid inſpection, might in all likelyhood amount to.

CHAP

# CHAP. XI.

*The whole order and manner of Proceeding about a* SEARCH *made into the Records kept by any Register*, &c.

## SECT. 1.

1. *The Tenor of the Monition to exhibit the Records or Manuscripts, before Commissioners, in order to have them Searcht.*
2. *The manner of desiring a Search.*
3. *The form of Proceeding in the said Search.*
4. *The form of Drawing the Proctors Answer to an Allegation.*
5. *The manner of Exhibiting Instruments before the Judge*, &c. *See Part 3. Sect. 7. n. 4. of this Book.*
6. *The manner of Protesting against these Exhibits. See there. Numb. 5.*

THE Proctor who desires a Search, must procure the aforesaid Monition, and get it Sealed under the Seal of the Judge, and then get it Executed against the Persons in whose custody these Records or Manuscripts do remain. And this Monition is to be Certified with an Authentical Certificate, (as in other Causes) before the Commissioners, so soon as they sit in the day and place appointed.

2. If in any Registry or Publick Office or Arches, any Instruments or Writings do remain, which make any way to the proof of the Contents of the Libel, given in by the Plaintiff or the Defendant; the Party so having occasion for them, must alledge to the Judge, that there are divers Instruments or Manuscripts, (which he must specifie if he can) which do necessarily make to the proof of the Contents of his Libel, or other matter, by him propounded and exhibited, and which remain in the Registry or Publick

lick Office of the Reverend Father, *N.* (or any other perſon, in whoſe cuſtody they are, naming the ſaid perſon,) wherefore he muſt deſire that a Search may be granted to *M. N.* and *O.* (perſons in Eccleſiaſtical Dignity) jointly and ſeverally, to Search the Rolls and the ſaid Writings upon ſuch days, in ſuch a place, (which place is wont to be the place where thoſe Rolls are kept) and that *N.* the Adverſe Party, or rather his Proctor may be admoniſhed to be preſent at this Search: Alſo that a Monition may be Decreed againſt the ſaid Reverend Father, *&c.* or any other in whoſe cuſtody theſe Manuſcripts do remain, to exhibit the ſame, before the ſaid Commiſſioners, on the day and place aforeſaid, to the end they may be Searched: Which Petition and Monition, the Judge decrees as is deſired. In the deſiring and decreeing theſe Searches, ſome years agone, an errour (as Mr. *Clarke* accounts it) hath crept in; (*Scil.*) in as much as the Commiſſion upon this Search, is requeſted and decreed to be ſit upon in ſome Conſiſtory, with a Monition to exhibit the Records before the Commiſſioners in that place, and not in the Regiſtries or Offices, where they are kept; ſeeing that of ancient time, the Manuſcripts and Exhibits were wont to be kept in a publick place, particularly ſet apart for this purpoſe; and in this caſe, if the Original Exhibits, mentioned in the Allegation or Commiſſion, made or granted upon this Search,) be found by the Commiſſioners, Searching the Regiſtry or Office, they will make much more proof, than if they had been brought by the Regiſter, to any other place. For in caſe they be ſo brought by the Regiſter, how can it be proved that theſe Exhibits or Manuſcripts, alledged, were in the Office or Regiſtry, and faithfully kept there? Truly no way at all; except only that the Regiſter, and ſometimes his Clark, when they exhibit the ſame, do affirm upon their word, or their Oath, that they were ſo kept. Therefore Mr. *Clarke* believes it moſt ſafe for the future, that the Parties in Sute do take care, that all the Searches be made in the Offices.

3. When the Commiſſioners and the Notary are preſent, on the day, and at the place where the Search is to be

be made, the Proctor or his Substitute, (exhibiting his Substitution) must acquaint the Commissioners, that (on behalf of the Worshipful, the Official of the Beautiful Court of *Canterbury*, or some other Judge who granted the Search,) he doth present unto them, the Letters Commissional, in in order to make a Search; and he must desire that they will vouchsafe to take upon them, the Execution of this Commission, and decree that it may be proceeded upon, according to the tenor thereof. Then the Commissioners must cause the Commission to be publickly read; and having so done, they must say, 'Out of the Reverence or Ho-'nour we bear to the Arch-bishop, (if it be him who grants 'it) we take upon us this Commission, and do decree that 'it shall be proceeded upon, according to the force, form, 'tenor and effect thereof, and do take unto us this Notary 'here present, to be the Writer of our Acts in this behalf. Then the Proctor of the Adverse Party is to be publickly called; and they must proceed in all things, in Penalty of his Contempt, if he appears not, as is shown before, in the Production of Witnesses upon a Commission, *&c.* If the Adverse Party or his Proctor doth appear, then if in case the Search be not to be made in the Office, the Party desiring the Search, must Exhibit the Original Mandate, with a Certificate upon it, and must accuse the Contempt of *M. N.* and *O.* who were admonished according to the Tenor of the said Mandate, to exhibit on this day, and in this place, the Manuscripts mentioned in the Letters Commissional: And then the Register or Keeper of these Manuscripts must say, on the part of *N.* (that is, the Judge to whom they belong) and on the part of me the Register or keeper of the Registry, in order to satisfie this Monition, I Exhibit such a Writing, or such an Instrument, or such a Book, *&c.* and then the Party desiring the Search, must also Exhibit the said Writings, so far as they make on his part, and must desire that they may be diligently Read, Searched and inspected, and that true Copies thereof, may be transcribed and faithfully collated with the Originals; and that such Collation being made, they may be transmitted to the Judge, who grants this Commission, on the day, and at the place, and according

cording to the Tenor of the aforeſaid Commiſſion. All which things, the Commiſſioners muſt do, and decree, in preſence of the Adverſe Party, and of the Notary Publick whom they took unto them, and they muſt Certifie the ſame, as the Commiſſion (granted for examination of the Witneſſes,) is to be Certified. But as was ſaid above, if the Adverſe Party doth not appear, neither by himſelf nor his Proctor, then all things are to be done, exhibited, and decreed, in Penalty of the Contempt of the ſaid Party, being called, accuſed and pronounced as Contumacious, *&c.* And if the aforeſaid Search be made in the Office, where the Records are kept, then the ſaid Commiſſioners, in preſence of the Adverſe Party (if he be preſent) or Penalty of his Contempt, (if he do contumaciouſly abſent himſelf) muſt make the aforeſaid Regiſtry be Searched, (the Manuſcripts mentioned in the Commiſſion, being produced in preſence of the ſaid Notary, whom they have taken unto them,) and they ought to proceed and certifie, as above. But in theſe caſes, the Regiſter or Keeper of the ſaid Manuſcripts, for the better diſpatch of this Search, is wont to ſhew the Commiſſioners the ſaid Manuſcripts, or the place where they are wont to be put and kept. But it may be enquired here, how and in what manner they muſt proceed, if the Biſhop or Regiſter being admoniſhed (as above) to exhibit the ſaid Manuſcripts, before the ſaid Commiſſioners, do not appear, nor ſatisfie this Monition? (*viz.*) Whether or no they can be Excommunicate for this their Contempt, by the ſaid Commiſſioners, or otherways an Authentical Certificate being made by theſe Commiſſioners, (to the Judge who grants the Commiſſion, to acquaint him of all things acted and done by them,) the ſaid Judge may proceed againſt theſe Contemners, in a Cauſe of Contempt, and may puniſh them by the Eccleſiaſtical Cenſures? It has been very much controverted and diſputed about this queſtion, thirty years ago, amongſt the moſt skilful Advocates; but Mr. *Clarke* doth not remember how it was decided. But the moſt experienced Practitioners, were of this opinion, (*viz.*) that the ſaid Commiſſioners could not Excommunicate the Biſhop or Regiſter, though they were admoniſhed (as above) to exhibit the ſaid Ma-

nuſcripts; ſeeing that in the Commiſſion granted for this Search, there is not given, (at leaſt it is not uſual to give) any power, (either expreſly or in equipollent ter ms) to Excommunicate the Parties in not exhibiting the ſaid Manuſcripts. To avoid this queſtion therefore, for the future, let the Proctor who deſires this Search, take care that in the ſaid Commiſſion, there be power granted to the Commiſſioners, to Excommunicate the Parties being admoniſhed, and not exhibiting theſe Manuſcripts; which Clauſe or power, was not wont to be inſcribed or inſerted, for many years together.

4. The Anſwers of the Proctor, (whereof mention is made before) ought to be drawn in Writing, and that in the firſt perſon, (*viz.*) The Anſwers of me *N.* the Proctor of *M.* made to the Poſitions of the Allegation and the Exhibits, given on the part of O. on ſuch a day. And then, I anſwer thus to the Allegation and the Exhibits, and I believe according to the truth, and as a Proctor is bound to believe the truth in his conſcience. And if the Allegations or matter, whereto he is to anſwer, is in Articles, he ought to anſwer reſpectively to every Article: If there are diverſe Inſtruments exhibited, the Proctor ought to anſwer particularly, (by the words I do, or I do not believe) to every part of the Allegation, and to every Exhibit ſeverally; for a general Negative Anſwer (which is frequent now adays, without inſpecting thoſe things, to which they anſwer) is not to be admitted, by the ſtyle of the Court, though they anſwer by theſe words, [to ſuch an Allegation, and to the Exhibits mentioned in the ſame, I anſwer, that I do not believe the ſame to be true in any part.]

CHAP

# CHAP. XII.

## *The manner of Proving WILLS in SOLEMN Form of Law.*

### SECT. 1.

1. *The form of comparing Letters, which are commonly had and made in the Prerogative Court, in order to prove the Teſtators Hand.*
2. *The manner of Proving a Will, in a Court of Controverſy, that Sentence may be pronounced for the validity of it, though no Witneſſes were preſent at the time of making the ſame.*

IF it is conteſted, whether the Will in diſpute be written or ſubſcribed with the Teſtators Hand or not, or whether or no any Inſtrument, (as Indentures, Leaſes and Bonds, (which are for the moſt part, incidently, and not principally exhibited, to prove the intention of the Plaintiff or the Defendant) were writ or ſubſcribed, with the proper Hand-writing of the perſons named in the ſame. If they who are Witneſſes to the Will or Inſtrument, are dead, or were not produced as Witneſſes, before this Sute was begun: Yet if the Party hath other Writings, (though altogether impertinent to the Cauſe inſtituted) under the Hand of the Teſtator, or other perſons, named in thoſe Exhibits, and alſo Witneſſes who can depoſe that they ſaw the Teſtator, or the aforeſaid Parties ſubſcribe this Writing, *&c.* then the Proctor muſt exhibit thoſe Writings, in ſupply of the proof of the Contents in the Allegation made upon the Will, or other Writing, and muſt alledge theſe words, (*Scil.*) the words contained in thoſe Exhibits, ſo given in ſupply of the proof of the Contents, and that the Name and Sirname of the Teſtator, (or other aforeſaid perſons) was and is writ with the proper Hand writing

of the Teſtator, or perſons aforeſaid, (*viz.*) with that ſame Hand, wherewith the Will, or other the aforeſaid Exhibits, given in the firſt place, were and are writ: And this Allegation is to be propounded jointly and ſeverally, and is to be admitted as in other Cauſes: And witneſſes are to be produced upon theſe Alledgments and the Exhibits; and the Depoſitions being publiſhed, if the Party exhibiting the Premiſes, doth prove thoſe things alledged, the Proctor muſt alledge, that his intention, mentioned in the Allegation, by him exhibited and given in, on ſuch a day, is ſufficiently founded by the Exhibits and Depoſitions of the Witneſſes, by him given in, and produced in the ſecond place, referring himſelf to the ſayings and depoſitions of thoſe Witneſſes, and to thoſe Exhibits reſpectively, and to the Laws: And therefore he muſt deſire that compariſon may be made betwixt thoſe words (ſpecifying the words which the Witneſſes Swear, were writ by the Teſtator, or the aforeſaid perſons) and thoſe words, (ſpecifying the words which were alledged to be writ by the Teſtator, in the Writings firſt exhibited) and that perſons skilful in the Art of Writing may be choſen, and Sworn, faithfully to compare the Premiſes, and to return their Judgments againſt ſuch a day. Then the Judge, if it appears to him, that the aforeſaid Writings, (which were laſt of all exhibited, in order to prove the former) were ſubſcribed by the Teſtator, or other perſons mentioned in the firſt Exhibits, he muſt decree that a Compariſon ſhall be made, and that in order thereto, *M. N. O.* and *P.* (that is, four or ſix of the eldeſt and moſt skilful of the Proctors, beſt skilled in the Art of Writing) ſhall be ſworn faithfully to compare the aforeſaid Exhibits reſpectively, and to return their Judgments againſt ſuch a day. The Party who deſires this Compariſon, muſt take care that the Comparers do meet together for this purpoſe, in ſome place indifferent to both Parties: And muſt alſo take care that the Regiſter be preſent, to ſhew theſe Comparators all the Exhibits, and the Act made upon the Decree of the ſaid Compariſon; that ſo it may appear to them, upon what things they are to make this Compariſon: And it is alſo lawful for the Adverſe Party or his Proctor, to be preſent at this Com-

Compariſon, and to inform the Comparers, out of the Acts or the Exhibits themſelves, the diſſimilitude or variety of Hands or Characters, in the reſpective Exhibits. If the Comparers do find by this Compariſon thus made, and do return their Verdict, that the ſaid reſpective Writings, (*viz.* thoſe which were exhibited the firſt and ſecond time,) are one and the ſame Hand-writing; then they ought to return their Judgment or Verdict ſo, (by vertue of their Oath, upon a day aſſigned for this purpoſe) in Writing, with a Subſcription of their Hands, to this Relation reſpectively: And the Party deſiring this Compariſon, ought to exhibit this Relation, as a ſupply of the Proof of the Contents, mentioned in the Allegation and the Exhibits given in, in the firſt place; but the Proctor of the Adverſe Party may diſſent and proteſt as to the nullity thereof. If the Comparers (upon diligent compariſon of the Premiſes) do find that the aforeſaid Writings are unlike, and not writ with one and the ſame Hand, this their Verdict muſt alſo be returned, in like manner as the other, and the Proctor of the Adverſary may except this Relation, on his and his Clients part.

† *Michael. Graſſii Theſ. communis opinio. Sect. Teſtament. q.* 12. 19. *Maſcard. de probation. verb. Teſtament. concluſ.* 1352. *n.* 70. *Swimb. part.* 7. *Sect.* 12. *n.* 4. 9, 10. *Simo de pract. d. interpret. uit. voluntatis lib.* 1. *fol.* 195.

2. What as is here ſaid, concerning Wills writ by the Teſtator, no Witneſſes being preſent, *&c.* is quite out of uſe, and abrogated by a late Statute, in *CHARLES* the Second; however I ſhall inſert the Proceedings in this caſe for form ſake. Sometimes it falls out, that the Deceaſed being of perfect mind and memory, doth write his Will with his own Hand, or perhaps doth order another to write it, and doth ſubſcribe it himſelf, and doth dye before he doth publiſh and acknowledge the ſame before Witneſſes: Yet if in this caſe, the Teſtator being dead, the Executor is called to prove this Will by Witneſſes, if the ſaid Executor can prove by two † ſufficient Witneſſes, that the ſaid Will was immediately, (or at leaſt ſo ſpeedily, as that it could not be writ or forged, betwixt the Teſtators death, and the time of finding the Will) found in a Cheſt, Cupboard or Desk of the Teſtators, * in which other Writings of great moment, are wont to be kept: And if alſo the Will do appear by Compariſon, (made as was before directed) to have been writ or ſubſcribed with the Teſta-

* *Mantica de conject. ultima voluntat. l.* 6. *T.* 2, *Swimb. par.* 1. *Sect.* 14. *Mich. Graſſ. Theſaur. ubi ſupra q.* 86. *n.* 11.

tors own Hand, the Judge must pronounce for the validity of the Will. Mr. *Clarke* has known it often thus adjudged, at least if the Will were a Will to pious uses. Likewise if one Witness doth depose as to the making of the Will, upon his certain knowledge, and it doth appear by Comparison of the Letters, *&c.* that the same was writ or subscribed with the Testators own Hand; these two half proves are sufficient grounds, for the Judge to pronounce for the validity of the said Will. But we must understand it to be a Will, amongst Children, (*) or to pious uses, which has this priviledge. Also if two Witnesses do depose, that the Testator in their presence, did confess that he had made his Will; though he doth not declare the Contents of it, † nor in whose custody it is, or in what place it is; if it doth appear by Comparison, that the same is writ or subscribed with the Testators own Hand, and if this Will were found in a Chest of the Testators, as above, though not immediately, but some days after, yet this Will is valid, at least in the aforesaid pious Causes, or amongst the Deceaseds Children. Mr. *Clarke* has seen it often adjudged thus.

(*) *Mynſ. Inſt. Teſtator teſtans. Sect. ſed cum paulatim. n.* 15. *Weſemb. ff. t. de Teſtam. n.* 10. *Tiruquel. privileg. piæ Cauſæ* 12.

† *Mynſing. Inſt. T. de Teſtamentis ordinand. Sect. ſed cum paulatim. n.* 12.

CHAP.

# CHAP. XIII.

*The whole order and manner of Suing a COMMUNITY in theſe Courts, as a College, Dean and Chapter, &c.*

## SECT. I.

1. *Of a Citation againſt a Dean and Chapter; the Maſter, Fellows and Scholars of a College, or any other Community.*
2. *The manner of giving the perſonal Anſwers of a Dean and Chapter, the Maſter, Fellows and Scholars of a College, and other Community to the Poſitions of a Libel.*
3. *The form of anſwering to the Poſitions of the Libel by vertue of a ſpecial Proxy.*
4. *The form of exhibiting the Anſwers by vertue of a ſpecial Proxy.*
5. *The Proteſtation of the Proctor of the Adverſe Party, at the time of the Exhibition of this ſpecial Proxy and the Anſwer.*

IF any one hath any Action for a Legacy, or the Subſtraction of Tithes, or the like Cauſe, againſt a Dean and Chapter, or a Maſter, Fellows and Scholars of a College, or any other Community, who by reaſon of the multitude, cannot be eaſily convened or cited, (at leaſt perſonally) a Citation is to be drawn in theſe caſes, on this manner, (*Scil.*) that ye cite the Worſhipful *N.* Dean of the Cathedral Church of *M.* and the Chapter of the ſaid Church, [or thus] *N.* the Maſter and the Fellows and Scholars of the College of *M.* [or thus] the Major and the Community of the City of *London*, by affixing theſe preſents, upon the Doors of the Chapter-houſe, where the Dean and Chapter are wont to ſit: Likewiſe upon the outer Doors of that College, whoſe Maſter, &c.

is ſued: And ſo likewiſe againſt the Major, *&c.* by affixing the ſame, upon the Common-hall, or place where they are wont to keep their Court, (which is called the *Guild-hall*) and where the Citizens and Aldermen of the ſaid City are wont to have recourſe; theſe words, or ſome ſuch like, being added in every Citation, [ by ſuch ways and means, ſo as in all probability the Parties to be cited, may come to the knowledge hereof. ] Yet the Parties who commence Sute againſt theſe perſons, out of civility to them, are wont to intimate this Citation (before the Execution of it) to the Dean, or ſome one or other of the Chapter; as alſo to the Maſter of the College, or the Major or Recorder of the City; and muſt ſignifie that they intend to commence this Sute againſt them; and if notwithſtanding this Intimation, this Community doth not appear by their Lawful Syndick, upon the next Court day, to anſwer the aforeſaid Sute, then may this Citation be Executed in manner as was before directed. A Syndick † is he that hath a Mandate from a Dean and Chapter, or other Community, to manage ſutes and other buſineſſes, and ſometimes to Conſtitute a Proctor, exerciſing in that Court, where the Action is commenced: Theſe perſons may alſo Conſtitute this Proctor to be their Syndick. And it is to be noted, that in every Citation, the aforeſaid reſpective perſons, are not to be Cited to appear perſonally, as in an ordinary Citation, but they are to be Cited to appear by their Syndick, ſufficiently inſtructed and conſtituted: For a general or uſual Proxy is not ſufficient as to theſe perſons.

† *Weſemb. parat. ff. tit. quod cujuſq; Univerſitatis, n. 3. Alciatus in prax. fol. 56. à græco verbo συνδικεῖν, id eſt, adeſſe, patrocinari, defendere.*

2. If the Plaintiff in any Cauſe, relating to the aforeſaid perſons, doth deſire to have the perſonal Anſwers of thoſe perſons, to the Poſitions of the Libel, *&c.* it muſt be decreed for the principal Parties, that they appear upon ſuch a day, and in ſuch a place, by their Syndick, ſufficiently inſtructed and lawfully conſtituted, to anſwer to the aforeſaid Poſitions, by vertue of the Oath of the aforeſaid perſons. And againſt the day of this appearance, the Parties thus cited, ought to appoint a Syndick with a ſpecial Proxy, to anſwer (by vertue of their Oath) to every Poſition of the Libel, as is more fully declared, in the following number: For though the Proxy (before mentioned) be

be authentick, yet it is not ſufficient to theſe effects: And if the Parties thus cited, do not this, they are to be Excommunicate, as well as any other perſons, by thoſe general names, (*viz.*) the Dean and Chapter, all and ſingular, *&c.* and ſo likewiſe the other Communities before mentioned.

3. If a Biſhop, Dean and Chapter, Maſter of a College, Fellows and Scholars of a Community, or any other eminent or priviledged perſons, are called to anſwer perſonally, they ought to ſend their ſpecial Proctor *, or any other Syndick, who has a ſpecial and an authentical Proxy: For to this end and purpoſe, only a ſpecial Proctor can be admitted, (notwithſtanding what was ſaid before, touching their Syndick, or general Proctor exerciſing in the Cauſe,) to anſwer to their names, (and in their conſciences,) to Swear to theſe Poſitions. But in this Proxy, not only all and ſingular the Poſitions, to which they ought to anſwer, is to be inſerted, but alſo the ſeveral and diſtinct anſwers, to every ſuch Poſition, by the words I do, or I do not believe: Or elſe this anſwer avails not, neither is it a full and ſufficient anſwer.

* *Nonne hic Actor de quo fit mentio à Weſemb. ubi ſupra n. 3. litt. E. qui diſtinguitur à Syndico, ut ibi dicitur. Speculator par. 3. tit. de Actore. & tutore vel Syndico datur Actor.*

4. This Proctor thus conſtituted, muſt exhibit this ſpecial Proxy ſaying, I exhibit my ſpecial Proxy for *B.* and I make my part for the ſame: And in the name of my Client, I do anſwer and believe in and through all things, as is contained in the ſaid ſpecial Proxy; and in the conſcience of my Client, I do Swear upon the holy Evangeliſts, that theſe anſwers are true, according to the Information of my Client, and the credulity of his Proctor, in thoſe things which concern the fact of another, and the proper knowledge of my Client himſelf, in thoſe things which concern his own proper fact.

5. At the time of exhibiting this ſpecial Proxy and the Anſwer, the Proctor of the Adverſe Party, muſt ſay that he doth except the Contents of the Proxy, and the Anſwers, ſo far as they make on his and his Clients part; but if they make againſt him in any thing, he diſſents and proteſts as to the nullity and inauthenticity thereof: And he muſt alledge that it is not fully nor ſufficiently anſwered, referring himſelf to this Proxy, the Anſwers, and to the Laws. And then if the day of appearance of ſaid Party who

who is to give the Anſwer, is in being, (whether by the Certificate introduced, or continued until that day, or the Penalty being reſerved,) the Proctor who deſires the Anſwers, muſt exhibit the Original Mandate, *&c.* and deſire that the Party may be Excommunicate, *&c.* If theſe Anſwers are not Authentick, through the defect of the Authentical Proxy, or if the Laws permit not the Anſwers of the Proctor, or if the Anſwers are frivolous, and (ſuppoſe they be) made with an intent, injuſtly to defer the Sute, or ſometimes with an intent of making a fruſtratory Court, (defeating Juſtice as it were) if theſe things are made appear to the Judge, the Party is to be Excommunicate, notwithſtanding the aforeſaid Anſwers. But obſerve, that if the Judge doth deliberate upon this Petition, (*viz.*) whether the Anſwers are to be admitted, or the Party giving them, is to be Excommunicate; the Certificate of the ſaid perſonal decree is to be continued until that day, which the Judge doth aſſign, to hear his pleaſure; for otherways the ſaid Mandate being diſcontinued and withdrawn, the Party anſwering cannot be Excommunicate, but ought to be Cited *de novo*, to the effect, as at firſt.

THE

# THE PRACTICE OF THE Eccleſiaſtical Courts.

## *THE SEVENTH PART.*

### The whole Order and Method of proceeding in CRIMINAL Cauſes which are liable to be corrected and reformed by the Spiritual Magiſtrates.

### *The Rubric.*

BY the Common Law, † the puniſhment and correction of Crimes, doth belong to the Reverend the Biſhops and their Vicars in Spiritual things. Therefore every Biſhop, (in order to correct and puniſh thoſe Crimes, which are to be corrected and puniſhed, and to extirpate thoſe errors which are to be rooted out) in the firſt year of his Inthronization, (that is, after his Conſecration and Inſtallation to the Biſhoprick) is wont to viſit perſonally, as well in the head as the members, (that is, as well the Cathedral as the Collegiate, and Pariſh

† *Lind. c. de Conſuetud. Sect. Statuimus verb. inquirere.*

Pariſh Church) and the Clergy and People of his whole Dioceſe, and the whole Congregation committed to his charge. He is wont alſo for ſome Cauſes, to exerciſe the like Viſitation, once in every three years. But ſeeing the Biſhops are commonly reſident in the City of their Dioceſe, and are wont to have a ſpecial care, as to the manners and religion of the Citizens and the Inhabitants there, ſo as they cannot conveniently viſit the whole Dioceſe every year: And leſt the Crimes of the other Dioceſans ſhould remain unpuniſhed, and that the errors and hæreſies, (if any has crept in) ſhould be extirpated, the Arch-deacons, (who are called the eyes of the Biſhop *) are bound, and are wont to viſit (perſonally, or by their Officials) their Arch-deaconry every year, and are wont to reform and correct the Crimes and Errors therein hapning. And although by the Law, the correction and reformation of Crimes, (the greater at leaſt) doth not properly belong to the Arch-deacons (as was ſaid before) but to the Biſhops: Yet (either by ſome Commiſſions and Compoſitions, had and made between the Biſhops and their Arch-deacons formerly, or by Preſcription) the correction, reformation and puniſhment of (even the greater) Crimes, doth belong to every Arch-deacon of every Dioceſe within the Province of *Canterbury*, yet the Biſhop and the Arch-biſhop are not excluded, but they may (whenſoever any complaint is made to them, concerning any Eccleſiaſtical Crime,) proceed of their mere Office, or when it is promoted againſt all manner of Delinquents, and may correct their Crimes.

* *Lind. ubi ſupra verb. vel alios. &c. de Officio Archidiac. verb. viſitatione.*

CHAP.

# CHAP. I.

## *The manner of proceeding againſt Offenders by way of* INQUISITION.

### SECT. 1.

1. *What Inquiſition is, and how manifold.*
2. *In what caſes, and how a Citation is to be decreed upon an Inquiſition.*
3. *The manner of Executing and Certifying a Citation upon an Inquiſition.*
4. *The manner of proceeding, if the Party Cited doth appear.*
5. *The form of proceeding againſt the Offender, being Sworn to anſwer to Articles, and refuſing to anſwer to ſome Poſitions, to which he is bound by Law to anſwer.*
6. *The manner of proceeding againſt the Offender, denying to anſwer to a Criminal Poſition, although the Fame be proved or confeſſed.*
7. *The manner of proceeding againſt the Offender, who denies the Crime, but confeſſeth the publick Fame.*
8. *The manner of proceeding, where the Offender denies both the Crime objected, and the Fame.*
9. *The Tenor of the Interrogatories, to be adminiſtred againſt the Witneſſes produced in a Cauſe of Correction, whether to prove the Crime, or the publick Fame.*
10. *Of the final Determination of the aforeſaid Cauſe, and the Pronunciation of the Sentence.*
11. *The form of putting Sentence in Execution.*
12. *The Tenor of the Abſolutory Sentence, to be pronounced for the Party accuſed, if the Judge or the Promoter, do make default in the proof of the Articles.*

There

THere are three ways of proceeding upon Eccleſiaſtical Crimes, † as Mr. *Clarke* hath heard and practiſed, (*Scil.*) by Inquiſition, Accuſation and Denunciation. The firſt of which is here ſpoke of. Inquiſition is the ſearching out of ſome Crime, made by the Superior, in reſpect of thoſe who are ſubject to his Juriſdiction. But it cannot regularly be made, except a Fame or Rumor is noiſed abroad, and that by perſons of credit. It is threefold; (*Scil.*) 1. Abſolutely general, (*) in as much as it reſpects the Perſons and the Crimes; as when the Magiſtrate doth enquire, whether or no there are any wicked Men. 2. Abſolutely ſpecial: As when the Magiſtrate enquires upon a certain and determinate Crime, and againſt a certain perſon. 3. Both General and Special jointly, (*Scil.*) general as to the Perſons, and ſpecial as to the Crimes.

† *Alciat. in. prax. plenius de his. ubi omnia reperias oraine (quoad proceſſus) reſpectivè dicta.*

(*) *Alciat. ubi ſup. de Inquiſ. fol. 213. Joann. Anan. ſuper 5. decret. de Accuſ. in rubric. & Sect. Licet. & Sect. qualiter.*

2. If it comes to the ears of the Biſhop or the Arch-deacon, (whether by publick Fame, (†) or the relation of ſome Perſons of credit) that any one within his Dioceſe or Arch-deaconry, hath committed ſome notorious Crime, or doth obſtinately perſiſt in ſome erroneous Opinion or perverſe practice, or is ſuſpected ſo to do. Though ſuch a Crime has not been detected or preſented by the Churchwardens or Inquiſitors; the Biſhop or Arch-deacon may cite the Offender to appear perſonally before him, in his wonted place of Judgment, and not in private houſes (becauſe the Law ought to be executed publickly) to anſwer certain Articles, touching his Souls health, and eſpecially concerning ſuch a Crime, (here the Crime is to be ſpecified) to be objected againſt him.

(†) *Johan. Anan. ibid. Sect. qualiter in fine. & Sect. cum oporteat.*

3. Though ſometimes the Biſhops and Arch-deacons in Criminal Cauſes, are wont to cite perſons, not by Citations in Writing, under their Seals, and in their Names, but by their Apparators or Mandatories, by word of mouth: Yet it hath often been controverted, whether or no this Citation made thus, *viva voce*, doth avail, not being made in Writing, and whether or no the Party ſo cited, can be Excommunicate, (if he appears not) by the Judge, without a grievance being inflicted? To avoid this doubt therefore,

fore, it is requiſite that for the future, they be cited by a Citation in Writing, * in manner aforeſaid. Likewiſe the Biſhops and Arch-deacons were wont (no Primary Citation Preceding, and no Inquiſition being made for the Party to be Cited, nor any Certificate being returned or brought in upon the Inquiſition, neither any proof made that the Party to be Cited doth abſcond, ſo as he cannot be Cited perſonally) to decree that the ſaid perſons ſhould be Cited by publick Edict; and alſo (as Mr. *Clarke* has practiced; and which ſeems more diſagreeable to the Law,) the Apparitors were wont to leave at the houſe of the Parties to be convened, a little ſhort Note or Paper, in which was contained only the Name and Sirname of the Party to be Cited, and the day of his appearance, the Cauſe for which he was to appear, being omitted, and if that Party ſo to be Cited did not appear, (though no Oath were made by the Apparitors, that this Note was left) they were wont to Excommunicate them, and get them denounced as Excommunicate perſons: From which ſort of Proceedings, many Cauſes of Appeal were wont to ariſe, and the Parties Appealing have got the victory. Therefore it is moſt ſafe for the future, that a Primary Citation be granted, and that the Party be Cited perſonally, if it can be done, or elſe (an Authentical Certificate, or an Oath being made, that the Party to be Cited doth ſo abſcond, as that he cannot be Cited perſonally,) a Citation *viis & modis*, is to be decreed: Which being duly executed and returned, if the Defendant doth not appear, he may be Lawfully Excommunicate, and they may proceed againſt him, as in other Cauſes of Inſtance. † *Anan. ubi ſupra Sect. quæſtiter, quæ ſunt differentiæ inter Inquiſitionem ex officio & per promotorem officii fact. Ant. de cohab. cler. c. ultra, col. 25. verſic. ad quartum venio.*

* *Jo. Anan. ſuper 5. Decret. de Accuſ. c. qual. & quando, Sect. Debet igitur.*

4. The Citatory Mandate being returned, and the Party Cited appearing, the Judge, Biſhop or Arch-deacon, or their Official, may of their mere † Office, give and object Articles in Writing againſt the Party appearing, containing as well the Cauſes of his convention, as the publick Fame about that Crime, for which he is Cited, and may compel the ſaid Party to take his Oath, to make anſwer as to the truth in his own proper fact, and as to his credulity in the fact of another: And if he doth contumaciouſly refuſe this Oath, he is to be admoniſhed a firſt, a ſecond

cond and a third time (though all at one and the ſame moment) to take the Oath; and if he is yet pertinacious, (or rather contumacious) in not taking the Oath, or unjuſtly deferring to take it, he is to be Excommunicate, for this his manifeſt Contempt, and is not to be abſolved, until he take the Oath to anſwer, to obey the Law, and to ſtand to the Mandates of the Church: If the Party thus convened, doth take the Oath, to anſwer to theſe Articles, he is to be admoniſhed to undergo his Examination upon the ſame, within or before ſome day, to be aſſigned for that purpoſe, at the pleaſure of the Judge, or elſe to appear upon that day, and ſee himſelf Excommunicate, for his Contempt in that behalf; and if he doth not undergo his Examination before the time aſſigned, (whether he appears then or not,) unleſs he purgeth this his Contempt, by alledging ſome Lawful Cauſes, he is to be Excommunicate for his Contempt and Contumacy, as above.

5. Although as was ſaid above, the Defendant is not obliged to anſwer to a Criminous Poſition, yet he ought to anſwer to the Fame, and to the Juriſdiction of the Judge. For the Judges are wont to alledge in their Articles, that the Defendant is of their Juriſdiction, that ſo the competency of the Court may appear. Therefore if this Defendant doth refuſe to anſwer, he is to be requeſted, bid and commanded to anſwer inſtantly; and if being thus requeſted and commanded, he doth not anſwer, or doth anſwer frivolouſly, or doth injuſtly delay to anſwer, he is to be pronounced contumacious, and in Penalty of this his Contempt, he is to be pronounced and declared as confeſſing thoſe Articles, to which he doth not anſwer: And this Pronunciation or Declaration, *pro confeſſo*, is æquipollent, to a confeſſion abſolutely made, and the Defended may be proceeded againſt, as if he had confeſſed thoſe Articles, to which he hath refuſed to anſwer; or like as if they had been ſufficiently proved by Witneſſes.

6. If the Defendant doth confeſs the Fame, or if it is ſufficiently proved by Witneſſes, the ſaid Defendant ought to anſwer to the Poſitions, although they be Criminal; and if he doth refuſe, or doth injuſtly defer to anſwer, he is to be requeſted, admoniſhed and commanded to anſwer, and

and if notwithſtanding that, he doth not anſwer, he is to be pronounced *pro confeſſo*, in manner and form as above.

7. If the Defendant doth confeſs the Fame, but doth deny the Crime objected, and if the Judge and the Promoter of his Office do believe, that they can prove the Crime, a Competent Term is to be aſſigned to the neceſſary Promoter of the Judge his Office, to prove the Criminal Articles, and Proofs are to be produced as in other ordinary Cauſes, and the Defendant is to be admoniſhed to be preſent at all the General Seſſions, until Sentence be pronounced incluſively: And if he doth not appear, the Proofs and the Witneſſes are to be received, admitted, ſworn and examined, and their Depoſitions are to be publiſhed (upon thoſe Articles objected), in Penalty of his Contempt: Alſo Sentence may be pronounced in his abſence, or rather notwithſtanding his Contempt. But it is moſt ſafe, after the Atteſts of the Witneſſes are publiſhed and received, that the Defendant be Cited anew, to hear the Definitive Sentence pronounced upon ſuch a day. And the Defendant may except againſt theſe Witneſſes, and reprehend them and their Depoſitions; or he may before Publication of the Witneſſes, propound and prove any ſort of matter for his defence, and in order to prove his innocency, as to the Crimes objected: If the Fame is confeſſed or proved, he may be enjoined Purgation, as in the following Number. And it is to be noted, that all Cauſes of Correction, inſtituted of the mere Office of the Judge, are Summary Cauſes, at leaſt, they are wont to have a Summary proceeding; but it is otherways, where there is a voluntary Promoter aſſigned.

8. If the Defendant doth deny both the Crime and the Fame, then if the Crime objected be notorious and publick, and if a publick Voice and Fame hath gone abroad concerning the ſame; the Judge muſt take care to produce and examin the Pariſhioners of the place where the Defendant lives, or any others to prove this Fame, and may compel them to give their Teſtimony; which if they refuſe, he may puniſh them by the Eccleſiaſtical Cenſures. And like as in Cauſes of Inſtance, it is Lawful for the Party againſt whom the Witneſſes are produced to adminiſter

any Interrogatories, against the Witneſſes of the Adverſary, which are pertinent to the Cauſe Inſtituted, in order to bring the truth to light: So alſo in theſe Cauſes of Correction, in which the ſtate, eſteem, good name and fame of any Man, doth depend amongſt the good and graver ſort of people, it is very requiſite and convenient, that the Defendant do adminiſter Interrogatories, againſt the Witneſſes produced of the Office of the Judge.

9. Seeing that the Witneſſes examined to prove the publick Fame, through the ignorance of the Regiſter, are wont ſometimes to depoſe generally, that a publick Fame, hath gone abroad, that the Defendant hath committed the Crime objected, not mentioning by what perſons the Fame aroſe, or from what Cauſes it had its Original; neither rendring any reaſons for their knowledge in their Depoſitions; the Defendant therefore may miniſter theſe following Interrogatories, (*viz.*) Firſt, againſt the perſons of the Witneſſes, as above; then he may deſire that the Witneſſes may ſpecifie thoſe perſons, from whom they heard the Fame; as alſo that they may declare particularly, thoſe ſigns or preſumptions, from whence this Fame took its riſe, which may be theſe, (*Scil.*) if the Defendant has been ſeen in the night time, in ſuſpicious places, with ſome ſuſpected Bawd or other Infamous Woman, and often converſing with her in private, and kiſſing her. And if it appears either by the Witneſſes Anſwers to theſe Interrogatories, or by the Proofs to be produced by the Defendant, that the Fame of the Crime objected, hath proceeded from, and been noiſed abroad by malevolent perſons, and ſuch as are enemies to the Defendant, or (which often falls out) by the nude and ſole Accuſation of ſome naughty Woman who confeſſeth her own naughtineſs. To theſe Criminous Poſitions, the Defendant is not bound to anſwer, nor ought he to be accuſed of them: Becauſe a Fame thus generally proved, is not ſaid to be proved properly, neither is it a Fame, but rather a falſe rumor.

10. If the publick Fame, touching the Crime objected, is proved, either by the Defendants confeſſion, or by Witneſſes, or if the vehement preſumptions and ſigns before noted, or ſuch like are proved, though the Crime objected

jected is not proved, yet the Judge † may enjoin Canonical Purgation to the Defendant, and if the Defendant makes default in his Purgation, he is to be pronounced as convict; and publick Penance is to be enjoined him. But if the Crime objected is proved, then they muſt proceed to Sentence, and to a concluſion in the Cauſe, as in other Summary Cauſes, and the Definitive Sentence is to be pronounced, whereby the Judge or the neceſſary Promoter of his Office, (if a neceſſary Promoter were aſſigned) hath proved their intention mentioned in the Articles objected; and that the Defendant hath not proved any thing, to fruſtrate the intention of the Office, as in ordinary Cauſes; and in the concluſion of the Sentence is to be pronounced to have committed the Crime objected and proved upon ſuch a day, by reaſon whereof, he is to be Canonically puniſhed, chaſtiſed and corrected, and a Salutary and Condign Penance is therefore, and ought to be by Law enjoyned the Defendant, and he is to be condemned in Charges, made on behalf of the Office, or its Promoter, with a Reſervation of the Taxation thereof, as in other Sentences.

† *Jo. Anan. ſuper 5. Decret. T. de Accuſ. Sect. Olim. penult. ſtatim poſt probationes proced. ad Sententiam.*

11. Sentence is to be put in Execution, and Penance is to be enjoined the Delinquent or Party convict, and it muſt be proceeded in all things, either in the preſence or abſence of the Party detected in the ſame manner, as is ſhewn before, where the Sentence is put in Execution, eſpecially in a Cauſe of Defamation.

12. If neither the Crime objected nor vehement Suſpicions and Preſumptions of the Crime objected are proved, Sentence is to be pronounced for the Defendant, to abſolve him from thoſe things related in the Articles objected, and he is to be reſtored to his former Fame and Credit, (in ſome meaſure injured by this Suit) and he is to be diſmiſſed from the Office, as to things objected, with his Charges.

## CHAP. II.

### *The manner of correcting Criminals by way of ACCUSATION* †.

### SECT. I.

† *Quænam sit differentia inter Accus. & Inquisition. vide Jo. Anan, ubi supra* T. *de Symo. Sect. Dilectus filius. Accusatio sive Accusare, est aliquem in Libello, reum criminis deferre vel facere ad vindictam. Hostiens. de Accus. in Sum. Alciat. in prax. tit. fol.* 202. *qualiter procedatur in Accus. ibi reperias, ad fol. usq;* 210.

IF any hath committed any Crime, (whereof the Spiritual Courts have Cognisance) and is not detected, denounced or presented for the same, or if the Bishop or Arch-deacon, have not proceeded against him, by way of Inquisition: Yet any person, (who offers himself ready to pay the Party to be convened his Charges, if he doth not prove the matters objected,) hath interest, voluntarily to implore and promote the Office of the Judge, and may call the Delinquent to answer Articles, and may administer Articles to him, when he appears in the Name of the Judge, and of his Office promoted, and may accuse the Delinquent. And seeing a Cause of Correction voluntarily promoted, is a Plenary Cause, it must be proceeded in, as in other Plenary Causes, and the Defendant in these cases, (except certain Causes, such as are Causes of Symony, notorious Usury and Incest, and all Causes concerning the privation or deposing a Clergy-man from his Benefice and Orders,) ought not to answer to the fame, because they are Criminous Positions; yet ought he to answer what he believes, touching the publick Fame, and it is to be proceeded in all things, in like manner, as upon an Inquisition. And the Parties may reply and give their Double Pleas, as in other ordinary Causes; and Sentence is to be pronounced for the Plaintiff, or against the Plaintiff, and for the Defendant, as before. But here observe, that if the Plaintiff in this case, doth prove the publick Fame, or vehement Presumptions, so as Purgation may be enjoined the Defendant, (though he proves not the Crime objected) yet he shall obtain Sentence, that Purgation ought

ought to be enjoined, and the Defendant is to be condemned in Charges of Sute: For by his denying the Fame, he hath cauſed the Defendant to conteſt, and be put to Charge about the proof of it.

## CHAP. III.

*The whole Order and Manner of proceeding againſt ſuch as are preſented by* CHURCH-WARDENS; *which is termed a Proceeding by way of* DENUNCIATION.

### SECT. 1.

1. *What Denunciation is, and how manifold.*
2. *The order of Electing, Viſiting, and Swearing Church-wardens, and the manner of Adminiſtring Articles of Inquiry to them, and an Oath thereupon, with the form of Drawing their Preſentments or Denunciation upon thoſe Articles.*
3. *The form of proceeding againſt thoſe perſons thus preſented and detected by the Church-wardens.*
4. *The Tenor of the publick Edict, ſent forth againſt thoſe perſons, and the manner of executing and returning it.*
5. *The form of the Defendants appearing with his Compurgators, and the Oath to be adminiſtred to him and them.*
6. *The order of Objecting againſt the Compurgators.*
7. *A Caution to be obſerved, both by ſuch as are Accuſers, and alſo by the Church-wardens or Inquiſitors.*

† *De Denunciatione.*

DEnunciation, according to *Hostiensis*, † is a relating or transmitting any Crime, to the knowledge of the Judge (Lawfully made without Inscription) in order to exact Penance, or impose any Lawful Penalty, *&c.* and it is either Evangelical, Judicial, * or Canonical, the last of which, is that here meant of; the which is either special, general or regular. See *Alciatus* in his Practice.

* *Alciat de Denun.*

2. In every Parish within the Province of *Canterbury* (time out of mind) the major part of each Parish, together with the consent of their Rector or Vicar, are wont every year, to elect two discreet and honest Men † of the Parish, to be their Guardians * or Church-wardens, as they term them; yet some of the Parishioners would have this Election and Constitution of these persons to belong solely to themselves, the Rector or Vicar being excluded by an ancient, (or rather a corrupt) Custom: And that themselves are wont to elect and constitute six, four, two, or more or fewer honest Men, to be Curators or Inquisitors, whom the Bishop or the Arch-deacon, (intending to visit) do call to appear in their Visitation, and to undergo that their Visitation; and at the time of their appearance, they are wont to administer Articles of Enquiry to them in Writing; upon which Articles they Swear them to enquire, and to return their Verdict, Presentment or Detection, upon those things enquired and found, against a certain time, then to be appointed. But the Articles used in these cases are wont to be drawn by way of Interrogatories, (*viz.*) whether any person within their Parish hath committed Adultery, *&c.* or is suspected of such Crimes. And so of the other Crimes, which belong to the Ecclesiastical Cognizance. After the Church-wardens are Sworn to enquire severally upon their conscience, and to search out as much as in them lyes, who and what persons have committed the aforesaid Crimes, or are suspected as such; they are wont to meet in the Parish Church, or other secret place, and confer together touching the Premises, and draw up into Writing particularly, those things to be presented, and the Names and Sirnames of the Delinquents on this manner. To such an Article we present such an one to be an

† *Jo. Anan. super* 5. *decr. de accus. c. sicut olim.*

* *Oeconomi dicuntur, à græco verbo* οἰκόνομος, *id est, dispensator Alciat. ubi s. fol.* 57.

an Adulterer, &c. or that he is commonly and publickly noted and ſuſpected of ſuch a Crime. Which Preſentment, by vertue of their aforeſaid Oath, they are to exhibit before the Viſitor, on the day appointed: Which if they do not, they are to be Excommunicate, by vertue of the aforeſaid Monition, to exhibit their Preſentment on ſuch a day, and are not to be abſolved, until they appear and exhibit their Preſentment. And it is to be noted, that (although it is very uſual now adays,) it is not ſufficient to preſent ſuch an one, to have committed, or be ſuſpected of Adultery: But the Party with whom they committed the ſame is alſo to be named, and that there is a publick Fame concerning the ſame: Or otherways, from ſuch a general and incertain Preſentment, Canonical Purgation cannot be enjoined, and if it be enjoined, the Party detected cannot purge himſelf, by reaſon of the uncertainty and generality of the Detection.

3. The perſons preſented are to be cited to appear upon ſome competent day, to be aſſigned by the Judge, to anſwer Articles, touching their Souls health, and eſpecially certain Crimes preſented in the Eccleſiaſtical Viſitation, lately celebrated. This Citation being duely executed and returned, the Judge muſt ſignifie to the Party convened, by word of mouth, the words of the Preſentment, or the effect of them on this manner: We obje unto you, that you are Lawfully detected and preſented before us, (by the Inquiſitors and Church-wardens of your Pariſh,) to have committed ſuch a Crime, (here ſpecifie the Crime preſented) and that there is a publick Fame and Rumor that you have committed this Crime preſented: And though the Party convened, is not bound to anſwer, whether he hath committed the Crime objected or not, (becauſe it is a Criminal Poſition,) yet he ought to anſwer negatively or affirmatively, as to the Fame objected, and though he denies both the Crime and the Fame, yet Canonical Purgation may be enjoined. Therefore the Judge is wont to Interrogate the Defendant, if he can alledge any Cauſe, why Canonical Purgation may not be enjoined him, and why a Competent day may not be aſſigned and appointed, (conſideration being had, to the

distance of the Defendants habitation, from the place of Judgment,) on which to purge himself, under four, six or eight hands of some honest Men of the Parish, according to the quality of the person, the weightiness of the Crime presented, and the Infamy; and is also wont to decree all and singular † (who either will, or can oppose and object against thus Purgation, and the Compurgators to be introduced) to be Cited, by publick Edict, or a Citation publickly denounced in the Parish Church of the Defendant, to appear at the day and place assigned for this Purgation, to propound and object in due form of Law, (if they think themselves interessed) against the Purgation and the Compurgators to be produced. And it is to be noted, that it hath been always practised and adjudged, that a Purgation may be enjoined upon the sole Presentment made by the Church-wardens and the Inquisitors, no Witnesses being produced to prove the publick Fame, (notwithstanding the Defendant doth deny upon his Oath, both the Crime and the Fame) because the Church-wardens and Inquisitors, Sworn in manner aforesaid, are said to be *Testes Synodales.*

† *Lind. de purgat. cap. Clerici. verb. solemnitate.*

4. In the aforesaid publick Edict, these things following are to be specified (*viz.*) that such an one, who was detected of such a Crime, is to purge himself on such a day, in such a place, with such a number of honest Parishioners, his Compurgators. This Edict is to be denounced by the Minister of the Parish Church of the Defendant, in the same Church in time of Divine Service, six days at least, before the day on which the Purgation is to be made, so as in all probability, those who have a mind to oppose this Purgation, may have knowledge of it, before the day appointed for the same. But this Citatory Edict is to be Certified, either personally upon the Oath of the Party publishing and executing the same, or by his Authentical Certificate.

5. The said publick Edict being returned with a Certificate, in manner and form as aforesaid, the Defendant is to be called publickly, if he appears, the Judge must ask him if he has his number of Compurgators ready in Court, according to the Assignment; and if he says he has them ready,

ready, then the Judge muſt cauſe Proclamation to be made three times, by the Cryer of the Court, for all and ſingular perſons Cited, in manner and form aforeſaid, to propound and object, (if they have ought to object againſt) againſt this Purgation, to hinder it, or againſt the Compurgators, to be produced in that behalf. But if none come to oppoſe, then they are to be pronounced contumacious, and in Penalty of their Contempt, the Judge muſt decree and proceed to Purgation, and all manner of Oppoſers whatever are to be ſilenced for the future, as to the Premiſes. Then the Party preſented muſt produce his Compurgators † and may deſire the Regiſter to write down their Names and Sirnames in the Acts, and muſt offer himſelf ready and prepared to take his Oath, as to his innocency in the Crime objected, and muſt deſire that his Compurgators may be admitted and received, and that right and juſtice may be done and adminiſtred to him. Then (ſeeing the Judge is not excluded from propoſing Objections, though none elſe object) if nothing can be propounded or objected by the Judge, againſt the Compurgators, or if it appears to the Judge, that they are Pariſhioners of the Pariſh where the Party detected lives, and honeſt Men; he muſt publickly recite, as well to the Party preſented, as to the Compurgators, the danger of Perjury, and the Penalty (as well by the Divine as the Humane Law,) due to thoſe who commit Perjury, and who do falſly invoke the Name of God: And he muſt often and ſeriouſly admoniſh them to have a care of their Souls, and he muſt alſo read them the Preſentment made by the Church-wardens, or he may command it to be read by the Regiſter. And if after all this, the Party detected doth inſiſt upon his former Petition, (that is, that he is ready to take the aforeſaid Oath, and doth deſire that his Compurgators may be admitted and received,) the Judge ought to adminiſter to the Party, this following Oath; (*viz.*) that he hath not committed the Crime objected, or that he is not guilty of this Crime. Which Oath, if the ſaid Party doth take with a bold and reſolute mind, then the Compurgators are to be asked, whether or no they will, and can with a ſafe conſcience Swear, that they believe

† *Lind. de purg. canon. c. Cæterum verb. Purgation. & verb. compellant. per tot. gloſſ. Jo. Anan. de Accuſ. c. cum oporteat, verſic. ſecundo quæritur.*

lieve the Party detected is innocent of the Crime, whereof he is detected, or that he hath taken a true Oath: Which Oath, if it is boldly and undoubtedly taken by the Compurgators, the Judge must Pronounce, that the Party detected hath Lawfully † and Canonically purged himself, and is innocent of the Crime objected, and therefore must restore him to his former State, Credit and Repute, and and so dismis him from his Office, as to those things objected.

† *Lind. ubi s. verb. compellant in fine gloss.*

6. If upon the return of the aforesaid Publick Edict, the Opposers do appear, they are to be admitted to propound any manner of concluding matter, against the Admission of the Purgation; (*viz.*) that the Party detected, hath committed the Crime objected, (specifying the Party with whom the Crime was committed, and the time and place of Commission of it:) Or that the Compurgators aforesaid, ought not to be received or admitted, in as much as they are the Parents, Kinsfolk or Tenants of the Party producing them, or very poor and needy (for a poor Man is not to be admitted, if the Parish is spacious, and if there be a multitude of Parishioners, but it is otherways, if it be little, and not populous) and such who may be easily corrupted and suborned of evil Fame, and a stained Reputation, and Criminous (specifying their Crimes) for those who object against a Purgator, may propound any Crimes, and that he is noted for the like Crime, for which the Defendant is presented; and lastly, such as ought not to be admitted to the Purgation of any person. If the Parties propounding the aforesaid Objections, do undertake to prove the same, they are to be admitted; and if they prove the Crime objected, Sentence is to be pronounced, that they have proved their intention mentioned in their Objections, and the Defendant is to be pronounced as Convict, and Canonical Penance is to be enjoined as before. But if only the things objected against the Compurgators are proved, the Party convened is to be pronounced to have made default in his Purgation, and Penance is to be enjoined as above, with a Condemnation of Charges in both cases, that is, if either the Crime is proved, or the Objections against the Compurgators:

In

In this laſt caſe, the Judge may, out of favour, grant the Party convened, a new day, on which to make his Purgation by other Compurgators: And then if he doth Lawfully prove himſelf guiltleſs, he is to be diſmiſt from the Office of the Judge, and is to be pronounced to have Lawfully purged himſelf, and is to be reſtored to his former Fame, but the cauſe which may induce the Judge, to grant this ſecond Purgation, may be this, (*Scil.*) where the Objections proved againſt the Compurgators, who were firſt rejected, were unknown to the Party producing them. But two things are to be noted; Firſt, that an Intimation of this ſecond Purgation, is to be denounced and publiſhed, and the objections are to be admitted againſt the ſame, as upon the firſt Purgation. Secondly, though the Defendant being admitted to this ſecond Purgation, doth Lawfully purge himſelf, yet he is not to be admitted, until he pay the Charges expended by the firſt Oppoſers. For if the firſt Oppoſers had failed in proving their Objections, they might have been condemned in Charges, due to the Defendant.

7. If any is accuſed (though judicially) upon any Crime, by a voluntary Promoter, if the Promoter doth not prove the truth of the Crime objected, or at leaſt that there is a public Fame, ariſing from vehement Cauſes and Preſumptions, ſo as that a Canonical Purgation is, or ought to be enjoined to the Party accuſed; the ſaid Party accuſed, may ſue the Party accuſing, in a Cauſe of Defamation; and the ſaid Accuſer is not leſs, but more to be puniſhed (that is, a more grievous aud publick Penance is to be aſſigned him) than if he had uttered Defamatory words, Face to Face, by word of Mouth. Likewiſe if the Church-wardens or Inquiſitors, do Preſent any one, for any notorious Crime, to be corrected by the Eccleſiaſtical Judge, or upon a publick Fame; and the Party preſented doth Lawfully purge himſelf, as well of the Crime, as the Fame, and proves that the Fame though preſented, did ariſe from malevolent and infamous perſons, and ſometimes from the ſole and nude accuſation of ſome naughty Woman, and the Judge by reaſon of this Proof, doth diſmiſs this Party thus preſented, from his Office,

fice, no Purgation being enjoined: The aforesaid Party presented, may in this case, sue those who presented him, in a Cause of Defamation, as above. Therefore let all beware for the future, how they accuse or present any body for any Crime or publick Fame, unless they prove that Fame, to have had its Original from very just Causes and vehement Presumptions. Therefore although a rumor or report of any Crime, hath been aspersed or gone abroad amongst many grave and honest Men; yet if this report took its Original from Enemies to the Party detected, or from some infamous Womans nude Accusation, the Parties accusing or presenting cannot be said to have just cause for their Presentment or Accusation, and therefore they are liable to an Action as before. But if they make a special and particular Presentment or Detection, according to the truth of the thing (that is, that such a Fame, or rather Rumor is dispersed abroad, by such Persons, or by the Accusation or Confession of a Woman with Child, or in Child-bed,) and not a general Presentment, as is wont to be made; in this case, the Party presented, if he doth Institute his Action, in a Cause of Defamation, he shall be Cast, if it be replyed and proved, that the Fame or Rumor was noised and reported abroad, as is contained in the Presentment.

CHAP.

## CHAP. IV.

*The Order and Manner of Confirming a* BISHOP. *And what things are to be done by the Proctor, at the time of his Confirmation.*

### SECT. 1.

FIrſt, a day and place being aſſigned for this Confirmation, before the worſhipful *N.* the Commiſſary, *&c.* The Letters of Commiſſion, and the King's Patent, under the Great Seal of *England*, muſt be preſented and publickly read before him. Which being ſo read, the ſaid Comiſſary muſt take upon him, the Execution of the ſaid Letters Commiſſional, *&c.* and decree that it may be proceeded, according to the force, form and effect of the ſame.

### SECT. 2.

THen the Proctor of the Dean and Chapter muſt appear, who muſt exhibit his Proxy for the ſaid Dean and Chapter, and make his part for the ſame, and preſent to the ſaid Commiſſary, the Reverend Father *W.* the Lord Biſhop, Elect, and ſet him before him.

SECT.

## SECT. 3.

THen the ſaid Proctor of the Chapter *U.* muſt exhibit the Citatory Mandate, taken forth againſt all Oppoſers, *&c.* with a Certificate upon the Execution of it, and muſt deſire that thoſe Parties ſo Cited, may be called. Then Proclamation muſt be made three times, for all the Parties Cited, *&c.* who being ſo called, and none appearing, the Proctor of the Chapter muſt accuſe their Contumacy, and deſire that they may be reputed Contumacious, and that in Penalty of this their Contempt, the way and means of oppoſing this Election, may be denyed them and every of them: And alſo he muſt deſire that the ſaid Commiſſary may proceed in the ſaid buſineſs of Confirmation, according as the Law requires, the abſence or contempt of the ſaid Parties (ſo Cited, and not appearing,) in any thing notwithſtanding, as is contained in a Schedule, which the ſaid Commiſſary muſt read.

## SECT. 4.

THeſe things thus done, the Proctor of the Chapter muſt give his Summary Petition in Writing, which the ſaid Commiſſary at his Petition, muſt admit, ſo far as by Law it is to be admitted; and muſt decree that it ſhall be proceeded Summarily, *& de plano*, and muſt aſſign the Proctor to prove his Petition immediately.

## SECT. 5.

THen the ſaid Proctor of the Chapter, in ſupply of the Proof of the Contents in the ſaid Summary Petition, muſt exhibit the Inſtrument or Letters Teſtimonial, upon the Proceſs of Election, made in Authentick form, and ſealed

led with the Dean and Chapters Common Seal; alſo the Letters Patent, ſhewing the King's aſſent to this Election, and the Inſtrument upon the conſent of the ſaid Lord Elect, ſo far as they make for the intention of the ſaid Dean and Chapter, *&c.* and the ſaid Commiſſary, muſt (at the Petition of the Chapters Proctor) aſſign an immediate Term, on which to hear his Sentence or final Decree.

## SECT. 6.

WHich things being thus diſpatched, Proclamation being made three times, for all perſons Cited, *&c.* and none appearing, the ſaid Proctor of the Chapter, muſt accuſe their Contumacy again, and in Penalty of this their Contempt, he muſt deſire the ſaid Commiſſary to decree, that it may be proceeded to the Pronouncing of Sentence or the final Decree, the abſence or contempt of thoſe perſons Cited, in any thing notwithſtanding; as is contained in a Schedule, which the ſaid Commiſſary muſt then read. Then the Biſhop Elected, muſt take the Oath of Supremacy, and the other uſual Oaths.

## SECT. 7.

AFter all this, the ſaid Commiſſary muſt read the Definitive Sentence, pronouncing, declaring and doing all other things as is contained in the ſame.

## SECT. 1.

THen the Commiſſary, (at the Petition of the Proctor, of the Chapter, and the Petition of the Biſhop Elected,) muſt decree Letters Teſtimonials to be made upon the Premiſes, *&c.*

*FINIS.*

# A BRIEF DISCOURSE,

Shewing the

## ORDER & STRUCTURE OF A LIBEL or DECLARATION.

*Nihil dictum, quod non prius*, is a Maxim, as true as 'tis general. So that to enlarge or ſay any thing in this Diſcourſe, more than what others, (of great Learning and Practice,) have ſaid before, is a thing I aim not at; neither would I have any ſo far miſtaken in me, as think me guilty of ſo much Vain Glory and Oſtentation. Neither were it poſſible for me, (or any elſe, as I think) to reduce this Diſcourſe, to a better Method than *Weſembecy* † has done, whoſe words I ſhall inſert, with ſome additions out of other Authors, which will render this Diſcourſe ſo compleat, as that the meaneſt capacity (our inſipid Proctors, I mean of) may form a Libel, without inſpecting their Precedent Books; which they can no more be without, than a Cripple without his Crutches. I queſtion not but the Learned Advocates, are ſo well

† *Parat. ff. T. de edendo.*

well ſtored with Diſcourſes of this nature, that this can be of little uſe to them.

1. *What a Libel is.*
2. *How many and what, are the parts of a Libel.*
3. *How many ſorts of Libels.*
4. *What things are ſaid to be proper to a Libel.*
5. *What is the efficient Cauſe of a Libel.*
6. *The matter of a Libel.*
7. *The form of a Libel; deduced alſo from a Syllogiſtical Argument.*
8. *In next, or the remote matter, ought to be expreſſed in a Libel.*
9. *The end of a Libel.*

A Libel is ſaid to be a Diminutive, *à Libro* from a Book; whence formerly a Paper was offered: In general it ſignifies every Writing: Figuratively the matter is put for the thing contained in it. But properly in this Argument, a Libel is taken for the Writing which contains the Action: * Or a Libel is nothing elſe, but a fit conception of words, ſetting forth a Specimen of the future Sute. † According to *Lanfranc.* (*c. quoniam. de Petition. n.* 7.) it is defined the Lawyers Argument.

2. It is ſaid to conſiſt of three parts. (*Scil.*) 1. The major Propoſition; which ſhews a juſt Cauſe of the Petition. 2. The Narration, or the minor Propoſition. Whereby is inferred (in the ſpecies of the fact propounded) that there is juſt cauſe for the Petition. 3. The concluſion or the concluſive Petition, which conjoins both the Propoſitions, and includes the minor in the major. † A Libel therefore is a practical and judicial Syllogiſm, as it were. Though *Speculator de Libelli confectione. Sect. quid Libellus*

* *Alciat. in prax. fol.* 18. *Speculator. de Libell. conf. Sect.* 1.

† *Ummius diſp. 6. th.* 8. *n.* 38.

† *Alciat. ubi ſupra Jaſon. Zaſius & alii in prin. Inſt de Action.*

*Libellus*, *n.* 3. recites its parts ſomewhat otherways; for in the firſt place, he puts the cauſe of the Libel, which is the major Propoſition: In the ſecond place, the Obligation, which is the minor Propoſition; and in the third place, the Action, which is the Concluſion: For the Petition it ſelf, is ſaid to be the Action: The Concluſion conſiſts in the Petition, and not in the words related. And this is the chief part of the Libel, which ought eſpecially to be regarded in Civil Actions; not ſo in Criminal Actions or Cauſes, becauſe in them, there needs no Concluſion. By this the * Plaintiff concludes, juſtly deſiring from the Premiſes, and the things propounded, that the Defendant may be condemned, both in the Principal and in the Charges. †

* *Alciat. ut ſupra.*

† *Speculator ubi ſupr. Sect. ſpecies. gloſ. in d. c. 1. Lanfr. c. quoniam. ad. verb. petitum de prob. n. 1. Alciat. in praxi. fol. 108. Ummius diſp. 6. ib. 8. Rosbach proceſſ. tit. 33.*

3. In reſpect of the ſubject matter of the Libels, there are only two ſorts in uſe; the one of which is Conventional or Civil, (*à Conveniendo*, from convening) the other Criminal, (*à Crimine ſeu Querimonia.*) † In reſpect of its form, it is either ſimple (which abſolves or declares the Action, in a continued Speech or Oration, as it were) or Articulate, (in which the merits of the Cauſe, are propounded by Articles. †)

† *Oldendor p. de forma Lib.*

4. The properties of a Libel, or thoſe things which are ſaid to be particularly proper to a Libel, are theſe, (*Scil.*) that it be round, (as the Civilians term it) Dilucide, concluding, not obſcure, uncertain, nor general or alternative. *

* *Ferrar in forma Lib. contr. opp. lib. &c.*

5. The efficient Cauſe of a Libel, is the Law, which depoſeth a Libel to be offered: But it commands principally that it be offered to the Judge (ſeeing his Office is implored upon this Petition) and then alſo to the Adverſe Party.

6. As to what reſpects the matter of a Libel: It is to be offered in all Cauſes, about which Judgment is ſtirred up, and a Sute is commenced betwixt two: And that as well in Civil as Criminal Cauſes, *&c.* but not alway in Summary Cauſes, (*viz.*) in Executions: For in theſe, any manner of Petition is ſufficient, though it be without Writing: Like as when it is proceeded by way of Inquiſition, or where the Office of the Judge is implored in an extraordinary manner.

7. The form of a Libel, (although it ought eſpecially to be drawn, according to the ſtyle and cuſtom of every Court, yet where there is no ſpecial cuſtom extant,) it ought to be drawn in Writing; and in ſuch manner, as that it may contain theſe five things, comprehended in theſe following Verſes.

*Quis, quid, coram quo, quo jure petatur & à quo.*
*Rectè compoſitus quique Libellus habet.* †

† *Hoſtienſis de Libell. obla. Alciat. ubi ſup. fol.* 18.

Each Plaintiff and Defendants Name,
And eke the Judge who tryes the ſame;
The thing demanded, and the right whereby
You urge to have it granted inſtantly:
He doth a Libel right and well compoſe,
Who forms the ſame, omitting none of thoſe.

* *Ita formari debet ut ex narratis ſufficiat jus agendi implicitè reſultare & id poſtea explicitè in probationibus declarari. Weſemb. ubi ſ. n.* 8. *Anchor. conſil.* 148. *n.* 6.

But the particular form of a Libel, * conſiſts in the concluſion, which (what it ought to be) *Jaſon in Sect. huic autem n.* 13. *Inſtitut. de Action.* copiouſly diſputes; ſo alſo *Myns. in Inſt. de Action.* At this day, ſuch reſpect is had to the concluſion, that it be ſufficient to gather from its form, of what nature the Action is, though no name be expreſſed: Which ſeems to have been otherways formerly, at leaſt by the

the Law of the *Codices*. To make this form the more dilucide and clear, we will diſpoſe it into an Argument or a Syllogiſm, † *in Darii*, which ſhall in ſhort comprehend the whole matter, and all the parts of a Libel.

† *Lanfr. c. quoniam. de prob. ad verb. petitum. n.* 8.

*Every one who Defames an honeſt Man, ought to be Eccleſiaſtically puniſhed.*
A. G. *hath Defamed a certain honeſt Man* J. G.
*Therefore the ſaid* A. G. *ought to be Eccleſiaſtically puniſhed.*

8. Civil Actions are either ſingular, general or univerſal, as was ſhewn in the Practice. Thoſe Actions which are ſingular, are alſo either real, perſonal, or mixt as has been ſhewn. Now in a real Action, the next Cauſe, and not the remote, ought to be expreſſed, * as for example, I demand ten pound of *Titius* which I ſent him, and I deſire he may be condemned to pay me that Sum: Here now the Contract, or the lending Mony, is the next Cauſe in a real Action, and it is the remote Cauſe in a perſonal Action; for the Obligation or Bond ariſing from the Contract, is the next or neareſt Cauſe in a perſonal Action, and the remote Cauſe in a real Action: Wherefore in a real Action, if you ſay in your Libel, I ask ten pound of *Titius*, which he owes me upon Bond; here your Libel is ſo general, as it is in danger of being voided, if the Defendant excepts againſt it: But if in this Action, you ſay on this manner, I ask ten pound of *Titius* which I ſent him, the Libel is dilucide, by your making mention of the next Cauſe: And ſo obſerve the quite

* *Lanfr. ubiſ. n.* 3. *Mynſ. Inſt. de Act. in Rub. n.* 13. *& Sect. omnium autem. n.* 14, 15.

† *Lanfr. ubi ſupra. n.* 3, 4. 5, 6.

contrary in a perſonal Action. † But in a general or univerſal Judgment or Action, there is no need of mentioning any Cauſe.

9. The end of the Libel is, that it may propound the Plaintiffs deſire, and inſtruct the Judge and the Adverſary, as to the nature of the future Sute, and to be the foundation of Judgment: For both the Articles of the Proofs are to be accommodated to the form of the Libel, and the Sentence is to be pronounced according to the ſame. Wherefore to the intent that the Judgment be begun in due order, and be founded upon a certain thing, it is neceſſary that a Libel be given by the Plaintiff, though not admoniſhed thereto: The Omiſſion whereof doth vitiate the proceedings. Whence a Libel is deſervedly ranked amongſt the ſubſtantial Acts of the proceedings: For no Libel exiſting, the proceedings are rendered null, *&c.*

10. Agreeable to what has been ſaid, I will here obviate the form of a Libel, as it is offered before the Judge of the Eccleſiaſtical Courts. And in the firſt place, it muſt be drawn in the Name and Style of the Judge, as *Alciatus* has alſo obſerved in his form, ſet down in his Practice, at fol. 18. (*viz.*)

In the Name of God Amen. *Before you the Worſhipful* H. W. *Doctor of Laws, Principal Official of the Beautiful Conſiſtory Court of* York, *&c. The Party of* J. G. *againſt* A. G. *&c. alledgeth and complaineth, and propoundeth,* &c.

*Major Propoſition.*

*Imprimis*, He doth Propound and Article, that the ſaid *J. G.* was and is a Man very honeſt, juſt and upright, of good fame, life and honeſt converſation,

ſation, aſperſed, defamed, with no Crime (at leaſt ſuch as is notorious) except what is afterward mentioned, and is commonly reputed, had, named and eſteemed as ſuch, &c.

*Item*, That notwithſtanding the Premiſes, the ſaid *A. G.* out of a malign ſpirit, in the Months of *A. M. J.* &c. in this preſent Year, 1630. in one or other of the ſaid Months, within the Parith* of *D.* aforeſaid, or ſome other place within the ſaid Pariſh, maliciouſly and out of an intent of Defaming and Injuring the ſaid *J. G.* hath defamed and injured him, and hath ſaid, uttered, &c. ſome Reproachful and Defamatory words, of and againſt the ſaid *J. G.* and eſpecially theſe words following, or the like in effect†, (*viz.*) the ſaid *J. G.* ſaid and reported (though falſly,) diverſe and ſundry times, or at leaſt once, ſpeaking to the ſaid *J. G.* thou haſt got a Wench with Child, &c. The Party doth Propound and Article, as to ſuch a time and manner of ſpeaking the words, &c. *Minor Propoſition.*

* *Ratio hujus apud Mynſ. Inſt. de Action. Sect. Maleſ. & Sect. curare autem.*

Wherefore Proof being made upon the Premiſes, the Party of the ſaid *J. G.* doth Requeſt or Petition, that the ſaid *A. G.* for ſuch exceſſive raſhneſs in the Premiſes, and concerning the ſame, may be corrected and puniſhed according to your pleaſure; and alſo that he may be condemned in Charges, made and to be made in this Cauſe, on the behalf of the ſaid *J. G.* &c. [*Mynſinger in Inſt. de injuriis Sect. in ſumma* concludes thus. Wherefore the Plaintiff deſires that (in order to repair his Fame and good Name,) the Defendant afore-named, may be compelled by you, and your Definitive Sentence, to diſown, confeſs and declare publickly, that the ſaid *Concluſion.*

Defamatory and Injurious words, were inadviſedly and againſt the truth, ſpoke and uttered by him, &c.] or otherways, that right and juſtice may be adminiſtred, &c.

*I deſire the Learned, candidly to accept and cenſure theſe my Endeavours, and pardon and amend what is amiſs; which I ſhall own as a reward ſufficient: If any thing is well done, I give God the Glory; if ill, I willingly undergo the Shame.*

τῶ θεῶ μόνον.

AN

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*What a Concluſion is, and when it may be ſaid to be concluded upon ſome one particular Article. The form of the Proctors concluding, and getting a time for Sentence. What effect ſuch an Aſſignation to hear Sentence (the Adverſe Party not being admoniſhed, &c.) hath in Law. The manner of giving informations to the Judge, &c.* §.2. N.1,2,3,4.

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*What it is, how manifold. What an Interlocutory Sentence or Decree is, and when it hath the force of a Definitive Sentence. In what form the Sentence ought to be drawn. The form, time and place of Pronouncing the Sentence in presence of the Adverse Party, and his Protestation,&c. The manner of Pronouncing Sentence in his absence, on Penalty,&c. The manner of Offering and Pronouncing two Sentences, and Compounding Charges* Ch. 6. §. 1. N. 1,2,3,4,5,6.

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Fees

## Fees taken and accounted due in the Courts of the Arch-bishops of *York*, according to a Table allowed of in the 13. of Queen *Elizabeth*.

### To the Judge.

| | s. | d. |
|---|---|---|
| FOR *every Probate of a Will and every Administration* | 2. | 10. |
| *For the Respite of an Inventory* | 1. | 0. |
| *For every Tuition or Curation* | 6. | 0. |
| *For the Election of a Curator, made by one above 14 and under 21 Years of age* | 1. | 0. |
| *For founding the Prerogative Jurisdiction* | 1. | 0. |

### To the Register.

| | | |
|---|---|---|
| *For every Probate of a Will and every Administration* | 3. | 6. |
| *For Registring the Will, and every Bond entred* | 2. | 0. |
| *For Respite of an Inventory* | 1. | 0. |
| *For every Tuition or Curation* | 4. | 8. |
| *For the Election of a Curator made as above* | 1. | 0. |
| *For the Tuition Bond* | 1. | 0. |
| *For ingrossing Wills and Inventories, they take according to the length* | | |
| *For Commissions, whether to prove Wills, or grant Administrations, &c. they take for Judge and Register together, as the whole Fee of it* | 8. | 4. |
| *If any of the aforesaid things are done by Rural Deans, there is due to the Rural Dean besides those* | 6. | 8. |
| *For Copies of Wills and Inventories to the Register, by this Table of Fees now spoke of, there is only allowed* | 2. | 6. |
| *For Copyes of Bonds there is only to the Register.* | 1. | 6. |
| *For every search also in the said Courts the Register has* | 1. | 0. |
| *For founding the Prerogative Jurisdiction when a Will is proved or Administration granted, upon* bona notabilia | 1. | 0. |

Instead

Instead of the aforesaid Fees they take at this day,

*To the Judge for an Administration where the Estate is above 40 l. or upwards* 7 s. 0 d.

*Which advance from 2 s. 10 d. was (as I have heard) in compassion to one of the Commissaries (of the late Arch-bishops) his necessitous condition agreed by all the Proctors and other Officers to be imposed upon the Country.*

*The Registers now receive for each Probate and Administration* 5. 6.

*For Copies of Wills and Inventories, the Registers now receive to themselves and their Deputies, besides their Scribes Fees* 4. 6.

*For Copyes of Bonds they receive* 3. 6.

*For a special Act, as they tell you, you must pay* 1. 0.

*The Reason of this Augmentation to the Registers is, because they pay great Fines to the Arch-bishops for their Places; and do again let them for term of Years to Deputies, for great Fines: Which Deputies have no way to raise their Moneys, but by this manner of advance or exaction upon the Country.*

*If an Administration (where the Estate is above 40 l.) is granted by a Rural Dean; he makes the Parties pay (besides his own Fee and the Fees of 7 s. and 5 s. and 6 d. to the Judge and Register) for a special Commission 8 s. 4 d. so that the whole Charge to the very Court will be at least 1 l. 0 s. 10 d.*

*There are many other Fees, for Copies of Acts, Depositions of Witnesses, and several things* in foro contradictorio, *which might indeed be added; as also Fees to the Apparators, &c. but these are most remarkable and obvious to the Vulgar; being so frequently enquired after. Which are delivered without the least design of injuring any, but rather of doing right to all; and with intent to maugre all those hideous exclamations of oppression (these Courts are daily accused of) by removing the Cause of such Outcryes.*

ERRATA.

# ERRATA.

PAge, 9. in the margine r. *teſtand.* p. 18 in the margine r. *ſententia excommun.* p. 19. l. 26. blot out the word [year.] p. 20. l. 27. r. lies. p. 24. l. the laſt r. Antecedent cauſe. p. 32. in margine r. *Elementa juriſprud.* p. 33. l. the laſt r. thence. p. 39. l. 10. r. incur l. 12. r. ſignificavit. p. 40. l. 9 r. be Excommunicate. p. 41. l. 6 r. very. p. 45. l. 4. r. cite the Defendant. p. 54. l. 31 r. *dilatio deliberativa.* p. 55. l. 9. r. the action. in the margine r. *teſtamentarius.* p. 76. in margine r. *Specul. de litis conteſt.* p. 79. l. 13 r. ſubſtantial. p. 89. l. 7. r. calumny. p. 94. l. 37. r. to give. p. 101. l. the laſt. r. *mutatis mutandis.* p. 102. l. 22. r. the Petition of the Proctor. p. 105. l. 18. r. not accepted. p. 110. l. 36. r. be. p. 116. in margine. r. *prox. præceden. ad formam Juramenti teſtium.* l. 11. r. theſe words with a parentheſis [in the preſence of the Adverſe Party.] p. 134. l. 12. r. occurs. p. 140. in the margine r. *Hæ exceptiones ſumuntur à circumſtantiâ perſonæ à qualitate.* p. 141. l. 16, and 17. blot out the words [In which caſe the Act of Court or Allegation] inſtead whereof r. [after this manner (*Scil.*) in the preſence of the *&c.*] l. 18. r. Party excepting. p. 145. l. 21. r. Defendants reprobatory, *&c.* p. 150. l. 13. r. accepts l. 31. r. this may ſuffice. p. 162. l. 19. r. deformity. p. 164. l. 16. r. incertain Petition. p. 166. l. 19. r. that word (Juſtice) ſo of his, *&c.* p. 170. l. 27. r. poſſeſſeth that determination; for a Sentence, *&c.* p. 174. l. 26. r. his preſence. p. 175. l. 27. r. I ſue. p. 186. in margine r. *Mynſ. cent.* 1. *obſ.* 31. *cent.* 3. p. 198. in margine r. *ordo Cam.* p. 206. l. 39. r. *titule.* p. 209. l. 29. r. to the Judge. p. 261. l. 39. r. relided. p. 305. l. 10. r. the Deceaſed had not. p. 314. l. 21. r. portable. l. 22. r. Sueth an Executor. p. 319. l. 34. r. their contempt, for not appearing, p. 325. l. 32. r. accepted. p. 335. l. 1. r. cannot. l. 2. r. in the 1 Sect. of the 4 Chapter. p. 344. l. 9. r. Almighty God. p. 357. in margine r. one of the Clarks, *&c.* p. 377. l. 34. r. accept. p. 387. l. 13. r. heir. p. 389. l. 3. r. Plaintiff. Alſo where it's miſprinted *Bartolius* r. *Bartolus.* Where its *Iſban ad Weſemb.* r. *Halm ad Weſemb.*

*Errata quælibet alia (raptim-ſcripta inconſultòve emiſſa) candidè à lectore emendata, gratè ab Autore ſint ſemper agnoſcenda.*